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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, G.E. UITHOVEN, CARRIE UITHOVEN, DAVID ASHMORE, PAUL THORNE, AND JAMES L. YOUNG

Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is it a legally insufficient defense within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure for a landowner to assert that the United States of America may not condemn property listed on the National Register of Historic Places under the provisions of the National Historic Preservation Act of 1966, 16 USC 461 et seq (hereinafter referred to as "NHPA") before it complies with NHPA and implementing procedures for compliance promulgated by the Advisory Council on Historic Preservation at 36 C.F.R. §800.1 et seq?

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Opinions Below	1
Grounds on Which the Jurisdiction of the Court is Invoked	1
Statutory Provisions and Regulations Which the Case Involves	2
Statement of the Case	3
Reasons Relied on for the Granting of the Writ	7
Conclusion	34
Certificate of Service	36

TABLE OF AUTHORITIES

PAGE

STATUTES

5. U.S.C. §701 31

National Historic Preservation Act, 16 U.S.C. §461 et seq i,2,5,11,12,13,16,17,18,19, 20,21,23,24,25,29,30,33,34, 35

16 U.S.C. §470(a) 24

16 U.S.C. §470(f) ...3,8,9,10,11,22,25,35

16 U.S.C. §470(i) 3,29

16 U.S.C. §470(j) 29

16 U.S.C. §470(t) 3

28 U.S.C. §1254(1) 1

28 U.S.C. §1358 3

40 U.S.C. §258(a) 2,7

National Environmental Policy Act, 42 U.S.C. §4321 et seq 21,28,33,34

42 U.S.C. §4332(1) 22,33

Rule 12(f), Federal Rules of Civil Procedure i

REGULATIONS AND EXECUTIVE ORDERS

Executive Order 11593 5

36 C.F.R. §800.1 et seq i,3,9,12,27

40 C.F.R. §1500 et seq 34

43 Fed. Reg. #26, February 7, 1978, p. 5210 4

COMMENTARIES

Environmental Law Institute, Federal Environmental Law, (1974) at 1496 34

J.M. Fowler, "Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law," 12 Wake Forest L.Rev. 31 (1976) 27

Nicholls, Eminent Domain, Vol. 7 33

Sutherland, Statutory Construction 14,20

1966 United States Code Congressional and Administrative News, 3307 25

CASES

Abbott Laboratories v. Gardner, 87 S.Ct. 1507 (1967) 30

Andrus v. Sierra Club, 99 S.Ct. 2335 (1979) 14,29

Berman v. Parker, 348 U.S. 26 (1954) 26

Brotherhood of Railroad Trainmen v. Central of Georgia

Railway Co., 415 F.2d 403 (5th Cir. 1969) 31

Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1108, 1128 (E.D.Tenn. 1976) 22

Caminetti v. United States, 37, S.Ct. 192 (1917) 14

Chapman v. Houston Welfare Rights Organization, 99 S.Ct. 1905 (1979) 21

Citizens to Preserve Overton Park v. Volpe, 91 S.Ct. 814 (1971) ... 31

City of Boston v. Volpe, 464 F.2d 254,257 (1st Cir. 1972) 22

Commissioner of Internal Revenue v. Brown, 85 S.Ct. 1162 (1965)... 16

Consumer Product Safety Commission v. GTE Sylvania, 100 S.Ct. 2051 (1980) 13

Diamond v. Chakrabarty, 100 S.Ct. 2204 (1980) 13

Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) 17,22

Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir.1972) 22

Greene County Planning Board v. FPC, 355 F.2d 412 (2nd Cir. 1977) 29

Gibson v. Ruckelshaus, 3 ERC 1028 (S.D. Ohio 1971) 33

Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962) 10

Mobil Alaska Pipeline Co., et al v. United States, 436 U.S. 631, 643, 98 S.Ct. 2053, 56 L.Ed.2d 591, 601 (1978) 16

Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L. Ed.2d 290, 301 (1974) 17

Rhode Island Committee on Energy v. General Services Administration, 397 F.Supp. 41, 55-61, (D.R.I. 1975) 22

Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1093-1094, (D.C. Cir. 1973) 22

Seadade Industries, Inc. v. Florida Power & Light Co., 275 So.2d 209 (1971) 33

Sturges v. Crownin-Shield, 4 L.Ed. 529 (1817) 16

Swarts v. Steiger, 117 F. 13 (8th Cir. 1902) 15

United States v. 4.18 Acres of Land, C.A. No. 3-74-33 (D.Idaho Feb. 20, 1975) 10

United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970) 10,18

United States v. 18.2 Acres of Land, et al, 442 F.Supp.

800 (E.D.Cal. 1977) 18,26

United States v. 247.37 Acres, 3 ERC 1098 (S.D. Ohio 1971) 26

United States v. 45,149.48 Acres of Land, 455 F.Supp. 192 (E.D.N.C. 1978) 11

United States ex rel. T.V.A. v. Three Tracts of Land, 415 F.Supp. 586 (E.D. Tenn. 1976) 11

United States v. Welden, 84 S.Ct. 1082 (1964) 17

United States v. Yuginovich, 41 S.Ct. 551 (1921) 20

Watch v. Harris, 603 F.2d 310 (2nd Cir. 1979) 25

OPINIONS BELOW

The opinion of the District Court is unreported. It is reproduced in the Appendix hereto.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 639 F.2d 299. It is also reproduced in the Appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment of the Court of Appeals was entered on March 13, 1981. The time of entry was not recorded by the Court of Appeals. A petition for rehearing and a suggestion for rehearing en banc were timely filed but denied on April 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS WHICH THE CASE INVOLVES

The Declaration of Taking Act (hereinafter referred to as "DOTA") provides in pertinent part:

> [T]he petitioner may file in the cause...a declaration of taking signed by the authority empowered by law to acquire the lands.... Upon the filing of said declaration of taking and of deposit [of estimated just compensation]... title shall vest in the United States and said land shall be deemed to be condemned and taken for the use of the United States....
>
> (40 U.S.C. §258(a))

NHPA provides in pertinent part:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal Department or independent agency having authority to license any undertaking shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take in account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under

> section 470i and 470t of this title, a reasonable opportunity to comment with regard to such undertaking. (Emphasis supplied)(16 U.S.C. §470(f))

This case also involves the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. §800.1 et seq. These regulations are lengthy and pertinent provisions thereof are reproduced in the Appendix hereto.

STATEMENT OF THE CASE

This is an eminent domain action instituted by the United States of America pursuant to DOTA. The action was filed at the request of the Secretary of the Army to obtain Petitioners' property for use in connection with a segment of the United States Army Corps of Engineers Tennessee-Tombigbee Waterway Project known as the Columbus Lock and Dam. The basis for jurisdiction in the Court of first instance was 28 U.S.C. §1358.

An antebellum home, named "Cedar Oaks," is located on the subject property. The property has been in the Uithoven family since 1913 and is part of the "Colbert-Barton Townsites" which are individually listed on the National Register of Historic Places under the provisions of the National Historic Preservation Act of 1966, 16 U.S.C. §470(a) as an "historic site." 43 Fed. Reg. #26, February 7, 1978, p. 5210.

The action was commenced on February 14, 1978 by Complaint. On February 24, 1978, in response to a Government motion, the District Court entered a Judgment on Declaration of Taking vesting title in the property to the Government.

The Defendants, Petitioners in this Court, timely filed their answer and asserted an affirmative defense to the condemnation, to-wit, that the property was listed on the National Register of Historic Places and therefore could be condemned only after

the Government had complied with NHPA, related Executive Order 11593 and implementing procedures for compliance promulgated by the Advisory Council on Historic Preservation.

The Government then filed a motion to strike this defense. After hearing, the District Court granted the motion to strike based on the reasoning that while the Government is bound by these laws, it is not required to comply with these laws until after it has condemned the property which is listed on the National Register of Historic Places. The basis for the decision of the District Court was as follows:

> There must be many historic sites either presently listed or qualified for listing in the Register. To place a burden such as Defendants propose on the Corps of Engineers in the acquisition of land for use in the Tennessee-Tombigbee Waterway Project would unnecessarily impede and delay the completion of the project.

The parties then stipulated to the just compensation payable to Petitioners

in the event the Government had the legal right to condemn the property. In this stipulation, Petitioners specifically reserved their rights to appeal the legal issue as to the validity of the condemnation.

Final judgment was entered on August 19, 1980, and a Notice of Appeal was filed on August 25, 1980.

Thereafter, Petitioners moved the District Court to grant a stay pending appeal, but the District Court overruled this motion on September 2, 1980.

Subsequent motions for stay pending appeal and expedited appeal were granted by the Court of Appeals for the Fifth Circuit on or about September 17, 1980.

Following oral argument, the Court of Appeals rendered its opinion on March 13, 1981, holding as follows:

> That portion of the opinion and judgment below which strikes noncompliance with the NHPA as a defense to

> the condemnation itself will be affirmed, but that portion which leaves "only the question of just compensation for the court's consideration" will be vacated, and we remand the cause so that the district court may determine, on petition of the Uithovens, whether compliance has taken place. If the court finds to the contrary, it must then decide what remedial action is appropriate.

An Application for Rehearing and a Suggestion for Rehearing En Banc were subsequently denied. Thereafter, the Court of Appeals stayed its mandate pending final disposition by this Honorable Court.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

The Court of Appeals Has Decided an Important Question of Federal Law, Which Has Not Been, But Should Be, Settled by This Court

Petitioners contend that 16 U.S.C. §470f requires that the United States Government comply with the regulatory procedures established pursuant to that Section before it can lawfully condemn property under DOTA, 40 U.S.C. §258a.

16 U.S.C. §470f provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking[1] or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or

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[1] The regulations of the Advisory Council on Historic Preservation clearly include a "condemnation" as an "undertaking." The Advisory Council regulations define "undertaking" as:

> (c) "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are: (1) Directly undertaken by Federal agencies; (2) supported in whole or in part through Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance; (3) carried out pursuant to a Federal lease, permit, license, certificate, approval or other form of entitlement or permission; or (4) proposed by a Federal agency for Congressional authorization or appropriation. 36 C.F.R. §800.2.

> eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i and 470t of this title a reasonable opportunity to comment with regard to such undertaking. (Emphasis supplied)

The procedures for compliance with Section 470f are established by regulations found at 36 C.F.R. §800.1, et seq. An elaboration of the procedures is unnecessary for the resolution of this case.

All parties agree that the law is settled that under DOTA, title automatically vests in the government upon the filing of a declaration of taking and payment into the registry of court the estimated just compensation, subject, however, to the right of the condemnee to show that the government lacks authority to condemn.

Petitioners contend that since DOTA requires expenditure of federal funds at the time of the filing the Declaration of Taking, the plain language of Section 470f dictates the government comply with Section

470f and regulations promulgated pursuant to it before filing the Declaration of Taking. Should the government condemn without complying, the condemnee can assert the government's noncompliance as a defense to the condemnation. The defense is in the nature of a plea in abatement, preventing condemnation until such time as the government complies. See, e.g., United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970) and Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

The public importance of this case derives both from its subject matter and its novelty. The decision of the Court of Appeals herein is the first Circuit Court decision on this issue, and there have been only three district court decisions on the point, and these are in conflict.[2]

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[2] United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D. Idaho February 20, 1975) holds that compliance with Section 470f is a statutory prerequisite to condemnation of an historical site. Peti-

(footnote continued next page)

The subject matter involves the construction and reconciliation of NHPA and DOTA, federal statutes governing the broad powers of the government to condemn private property and the expressed intent of Congress to further historic preservation. The public interest in the proper application of these laws is apparent. Petitioners submit that the opinion of the Court of Appeals is both contrary to the plain meaning of NHPA and the clearly expressed will of Congress, but is likely to have an especially influential impact on the future development of the law and the practices of federal agencies.

Section 470F of NHPA explicitly requires compliance with the Act and implementing

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tioners commend the reasoning of the district court in that decision to the Court's attention and have reproduced the opinion in the Appendix hereto. United States ex rel. TVA v. Three Tracts of Land, 415 F. Supp. 586 (E.D. Tenn. 1976) holds that the government need comply with NHPA only after condemnation. United States v. 45,149.48 Acres of Land, 455 F.Supp. 192 (E.D. N.C. 1978) holds Section 470f is no defense to condemnation, but no reasoning is given.

regulations "prior to the approval of the expenditure of any federal funds on the undertaking." (Emphasis Supplied) See 36 C.F.R. §800.1 et seq (especially 800.4). The Government cannot obtain ownership of the land without first paying just compensation. The payment of just compensation is obviously an expenditure of Federal funds on the undertaking, rendering the Act and the regulations fully operable. Nevertheless, the Court of Appeals' decision exempts from the requirements of NHPA the approval of the expenditure of federal funds for the acquisition of title and effectively holds that DOTA impliedly amends NHPA. Based on its construction of the two (2) statutes, the Court of Appeals concluded (Appendix pp. 15-16):

> [W]here it has been long established that the role of the district court in DOTA condemnations is limited to a bare consideration of the legal authority to take, and where the courts have been careful to refrain from considering matters of propriety, expediency

> and policy with regard to the use of the property sought, we conclude that only an express statement of Congress that NHPA noncompliance is a defense to a condemnation itself would be sufficient to achieve that result. While it may seem that the asserted defense would promite the purposes of the NHPA by creating a means of enforcement to give it "teeth" it is manifestly apparent that only Congress can make such a judgment.

We respectfully submit that this construction of the two (2) statutes departs from established principles of statutory construction.

In the first place, NHPA is explicit, clear and unambiguous.[3] As such, it should be applied as written and not held to be impliedly amended by DOTA. As recently stated by this Court in Consumer Product Safety Commission v. GTE Sylvania, 100 S.Ct. 2051 (1980) at 2056:

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[3] The breadth of NHPA does not render the statute ambiguous because the Congressional objective of historic preservation requires broad statutory terms. Cf. Diamond v. Chakrabarty, 100 S.Ct. 2204 (1980).

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

See also Andrus v. Sierra Club, 99 S.Ct. 2335 (1979) in which this Court stated at 2340:

> When Congress has thus spoken "in the plainest of words". . . we will ordinarily decline to fracture the clear language of a statute, even for the purpose of fashioning from the resulting fragments a rule that "accords with common sense and the public weal."

As stated in Sutherland, Statutory Construction:

> One of the most common of insights about the process of communication was given classic expression by the Supreme Court of the United States in the declaration that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ...the sole function of the courts is to enforce it according to its terms. (citing Caminetti v. United States, 37 S.Ct. 192 (1917)
> * * *
> There is no safer nor better settled canon of interpretation than that when language is clear and unam-

biguous it must be held to mean what it plainly expresses. ($46.01)(citing Swarts v. Steiger, 117 F. 13 (8th Cir. 1902)

* * *

Thus, a "clear and unambiguous" statutory provision generally is one having a meaning that is not contradicted by other language in the same act. For example, the Supreme Court of the United States has said:

> Although the spirit of the instrument, especially of the Constitution, is to be respected not less than its letter yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other and would be inconsistent unless the nature and common import of the words be validated, interpretation becomes necessary; and to depart from the obvious meaning of words is justifiable. Yet, in most cases, the plain meaning of a provision not contradicted by any other provision in the same instrument, is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation,

> unite in rejecting the application. (§46.04)(citing Sturges v. Crownin-Shield, 4 L.Ed. 529 (1817)) (Emphasis supplied)

We respectfully submit it is not within the province of the Court of Appeals to restrict the application of Congressional enactments unless exceptional circumstances are present:

> This Court, in interpreting the words of a statute has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results...or would thwart the obvious purpose of the statute' ... but it is otherwise 'where no such consequences would follow and where...it appears to be consonant with the purposes of the Act....' " (Citations omitted) Mobil Alaska Pipeline Co., et al v. United States, 436 U.S. 631, 643, 98 S.Ct. 2053, 56 L.Ed.2d 591, 601 (1978).

See also Commissioner of Internal Revenue v. Brown, 85 S.Ct. 1162 (1965) at 1166.

Secondly, we respectfully submit that it is erroneous to hold that NHPA and DOTA are in conflict and that DOTA impliedly amends NHPA to apply to the approval of any federal funds on the undertaking, other than for condemnation. It is a well estab-

lished principle of statutory construction that amendments by implication, like repeals by implication, are not favored. See, for example, United States v. Wèlden, 84 S.Ct. 1082 (1964) at 1087, N. 12. The proper resolution of the issue presented in this action requires that DOTA and NHPA be read and considered together. It is an axiomatic principle of statutory construction that, in the absence of exceptional factors, words will be given their ordinary meanings and where different statutes apply to a case, they will be read in such a way as to reconcile their application:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290, 301 (1974).

Likewise, in Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) the Court made it clear at 1133 that NHPA should be "read into" the

agency's authority. The Court reasoned that NHPA is a "mandatory" and "unequivocal command" to federal agencies (1137 at N.31) and that applicable federal statutes should be read in para materiae and reconciled, unless there is a clear conflict in statutory terms, so as to effectuate all statutory requirements. See also United States V. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970), and United States v. 18.2 Acres, 442 F.Supp. 800 (E.D. Cal. 1977) at 807.

Nevertheless, rather than reconciling the two statutes when, as in this case, the government seeks to condemn property listed on the National Register, the opinion of the Court of Appeals impliedly amends NHPA and rejects its clear statutory command that the government must comply with the Act and implementing regulations "prior to the approval of the expenditure of any Federal funds on the undertaking." (Emphasis

Supplied)

NHPA and DOTA may be easily reconciled by holding that until the Corps of Engineers properly complies with the statutory prerequisites established by Congress, the government is not authorized to proceed with the condemnation of any historic site listed on the National Register of Historic Places. In the statutory terms of DOTA, the agency is not "empowered by law to acquire" unless and until it complies with procedural requirements mandated by Congress. Noncompliance should be a defense to the condemnation because of the well settled jurisprudential rule[4] noted (Appendix p. 12) in the decision of the Court of Appeals that a condemnee may challenge "the validity of

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[4] Indeed, the "lack of authority" defense to condemnation is purely jurisprudential and for that reason alone it seems incongruous that the Court of Appeals would hold that if NHPA was to be considered a defense it would require an express statement by Congress.

the taking for departure from the statutory limits."

Third, even if the two (2) statutes do conflict, and we respectfully submit that they do not, it is erroneous for the Court of Appeals to hold that DOTA impliedly amends NHPA. DOTA was enacted in 1931 and NHPA was enacted in 1966. It is a well established principle of statutory construction that in the event of a conflict in statutory terms, the latest declaration of Congress prevails. Sutherland, Statutory Construction, at §22.22, citing United States v. Yuginovich, 41 S.Ct. 551 (1921). Therefore, if there is to be any implied amendment of the two (2) statutes, NHPA should be held to impliedly amend DOTA.

Fourth, the Court of Appeals notes (Appendix p.16) that "it may seem that the asserted defense would promote the purpose of the NHPA by creating a means of enforcement to give it 'teeth.' " Nevertheless, the

Court of Appeals declined to construe the statute in such a manner as to effectuate the Congressional purpose. In so doing, we most respectfully submit that the Court of Appeals did not follow the rule of statutory construction that it is the task of the courts to "interpret the words of those statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 99 S.Ct. 1905 (1979) at 1911.

Fifth, the narrow interpretation of NHPA as is implicit in the decision of the Court of Appeals contravenes statutory construction principles mandated by the National Environmental Policy Act, 42 U.S.C. §4321 (hereinafter referred to as NEPA). NEPA expresses a strong federal policy in favor of preserving the natural environment, including our "historic and cultural heritage." 42 U.S.C. §4331. To this end, Congress has directed that "to the fullest

extent possible," all laws, regulations, and policies of the United States should be interpreted and administered in accordance with the policies of NEPA.[5] 42 U.S.C. §4332(1); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) at 1132, N. 4.

If the two statutes are read and considered together, the plain and precise language of Section 470f clearly requires that the agency seeking to condemn must first comply with Section 470f. This

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[5] Compare analogous NEPA cases holding that there must be procedural compliance at a time which will be meaningful in view of Congressional dictates that agencies fully disclose impacts and give full consideration to alternatives. See, for example, Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1108, 1128 (D.C. Cir. 1971); City of Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972); Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1093-1094 (D.C. Cir. 1973); Rhode Island Committee on Energy v. General Services Administration, 397 F.Supp. 41, 55-61, (D.R.I. 1975). Surely, compliance is not meaningful if it comes after the agency makes a decision as to the location of a project and the use of a particular piece of property and expends funds and resources in implementing that decision.

construction in no way departs from the authorities holding that the only defense to a DOTA condemnation is lack of authority to take and that district courts do not properly consider matters of propriety or expediency. The position of Petitioners would merely require that the condemning agency comply with NHPA and consider historic preservation factors before exercising its discretionary decision making authority to condemn National Register property and spending federal funds to implement its decision.

The wisdom of the Congressional NHPA mandate lies in the fact that it requires an agency to consider the effect of condemning National Register property before, not after, the taking. After the taking, the agency is "locked in" to the use of the particular land and the consideration of alternative locations as a means of mitigating damage becomes truly a "pro

forma ritual." Moreover, once property is in the hands of the government, the alternative of preservation through private initiative is, for all practical purposes, dead. Indeed, the Congressional declaration of policy on NHPA clearly recognizes the importance of private preservation efforts and seeks to further encourage such efforts by the passage of the Act.[6]

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[6] 16 U.S.C. §470 states as follows:

The Congress finds and declares:

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(footnote continued next page)

The wisdom of the congressional scheme is ignored, however, by the opinion of the Court of Appeals, and in its place is substituted the requirement that the government comply only after condemnation. Petitioners respectfully submit that this ignores Congressional intent and substitutes the judgment of the Court for that of Congress[6] on the procedures agencies

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(d) that, although the major burdens of historic preservation have been borne and major effects initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and acitvites. (Emphasis supplied)

[6] Nothing in the legislative history of NHPA indicates that Congress meant for condemnation to be an exception to the requirements established by section 470f. See, 1966 United States Code Congressional and Administrative News 3307, et seq. For a cogent analysis of the legislative history, see Watch v. Harris, 603 F.2d 310 (2nd Cir. 1979) wherein it was observed at 323 that NHPA's "legislative

(footnote continued next page)

must follow.[7]

Furthermore, the Court of Appeals' holding that the taking of title is "environmentally neutral"[8] is explicitly contrary to the regulations of the Advisory Council on Historic Preservation.

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history reveals a determination to protect historic properties at every stage where the agency approves funding...."

[7] The corollary of the rule that the judiciary should not supplant its judgment for that of Congress or the Executive Branch on the "wisdom" of condemnations is that the judiciary should not supplant its judgment for that of Congress on the question of the procedures agencies are to follow in carrying out their delegated responsibilities. As this Court held in Berman v. Parker, 348 U.S. 26 (1954) at 33, the power of eminent domain is merely a means to the end and the means by which it will be attained is for the Congress to determine.

[8] Realistically, the "taking" and the "use" cannot be separated because, for all practical purposes, a condemnation action, by its very nature, is a decision to put private land to a certain public use, which may have a significant effect on the environment. See United States v. 18.2 Acres of Land, 442 F.Supp. 800 (E.D. Cal. 1977) at 807 and United States v. 247.37 Acres of Land, 3 ERC 1098 (S.D. Ohio 1971) at 1104.

In the first place, a condemnation is clearly within the regulations' meaning of an "undertaking." 36 C.F.R.§800.2. Secondly, the regulations define "effect" as follows:

> An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of the National Register. (Emphasis Supplied)
> * * *
> An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or further removed in distance, but are still reasonably foreseeable.
> (36 C.F.R. §800.3)

The Advisory Council's long-standing interpretation of the term "effect" is further explained in J.M. Fowler, "Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law," 12 Wake Forest L.Rev. 31 (1976) at 56 as

follows:

> It should be noted that the relationship of the undertaking to the effect need not be one of immediate causation. The criteria specify that if the undertaking causes or may cause a change in the property's significant qualities, it is considered to have an effect on the property. Where federal involvement forms an integral link in the chain of events that ultimately create upon a National Register property, NHPA requires that the administrative agency comply with the section 106 review process. Examples of cases brought before the Council on this basis include the proposed transfer by federal agencies of the San Francisco Mint and Old Post Office in St. Louis to local authorities for ultimate demolition, and the granting of a right-of-way by the National Park Service over the Gettysburg Battlefield to a private developer which would assist the construction of a 300 foot observation tower adjacent to the battlefield. These cases evidence the Council's interpretation that, even when the federal action is not in itself adverse, the nature of the ultimate effect made possible by federal involvement is sufficient to establish the necessary causal relationship to activate section 106.

The judicial deference accorded guidelines of the Council on Environmental Quality for compliance with NEPA indicates by

analogy that the Advisory Council's procedures are entitled to considerable weight in the interpretation of NHPA. Andrus v. Sierra Club, 99 S.Ct. 2335 (1979) and Greene County Planning Board v. FPC, 355 F.2d 412 (2nd Cir. 1972). The Advisory Council was created by NHPA and charged in that statute with the responsibility to advise the President and Congress, as well as state and federal agencies, on matters relating to historic preservation. 16 U.S.C. §470i and §470j. We therefore respectfully submit that the Courts should give "substantial deference" to the Advisory Council's interpretation of NHPA.

Moreover, the Court of Appeals' implicit finding that agency decisions to condemn National Register properties are unreviewable for NHPA compliance contravenes well established principles of administrative law. The Court of Appeals held that a showing of NHPA non-compliance may

warrant remedial action including the withholding of possession or the issuance of injunctive relief. However, in the opinion of the Court of Appeals, NHPA noncompliance would have no effect on the agency decision to condemn the property. In so holding, we respectfully submit that the Court of Appeals has effectively shielded agency decisions to condemn National Register property from judicial review for NHPA compliance. We respectfully submit, as previously stated, that the decision to exempt the condemnation of National Register property from NHPA is contrary to well established principles of statutory construction. Moreover, we respectfully submit that the Court of Appeals' decision to make the question of condemnation unreviewable for NHPA compliance is contrary to well established principles of administrative law. As stated by this Court in Abbott Laboratories v. Gardner, 87 S.Ct. 1507 (1967) at 1511:

> A survey of our cases shows that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress... only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

See also Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403 (5th Cir. 1969) at 413, N. 20. Similarly, in Citizens to Preserve Overton Park v. Volpe, 91 S.Ct. 814 (1971), this Court held that the Administrative Procedures Act, 5 U.S.C. §701, makes agency decisions reviewable except where there is a statutory prohibition of review or where the "agency action is committed to agency discretion by law." In the instant case, there is no "clear and convincing" evidence that agency decisions to condemn National Register property are to be unreviewable. There is no statutory prohibition of review. And it is well settled that agency decisions to condemn are not committed to the unbridled

discretion of the agency because, as noted by the Court of Appeals (Appendix p.13) it is well settled that judicial review may be had of the issue of whether the limits of authority were exceeded.[9] This is precisely what we seek in this case. We do not seek to have the Court review the necessity, propriety, expediency or policy of the government's decision to condemn this land. Such matters may well be committed to the discretion of the agency. But, we do seek to have the Court review the agency's compliance with the procedural law. We respectfully submit that it has never been our law that questions of agencies' compliance with procedural laws are committed to the unbridled discretion of the agencies. All governmental decisions must be made in

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[9] While, as noted by the Court of Appeals (Appendix p.12)the decree of the transfer of title may be almost ministerial procedurally, there is no reason why this necessarily must be the case in a situation where there is a serious question as to the legality of the agency actions.

accordance with the procedural requirements established by Congress and decisions to condemn National Register property should be no different.

The Court of Appeals Has Decided a Federal Question in a Manner Which Is In Conflict With a State Court of Last Resort

The Court of Appeals decision is in conflict with the decision of the Florida Supreme Court in Seadade Industries, Inc. v. Florida Power & Light Co., 275 So.2d 209 (1971) which decided the broader question of whether the failure to comply with environmental procedural requirements is a defense to a condemnation. See also Gibson v. Ruckelshaus, 3 ERC 1028 (E.D. Tex. 1971) and Nichols, Eminent Domain, (Vol. 7 §14.04.)[10]

---

[10] Although NHPA and NEPA are similar in purpose, we must point out that there are significant differences in statutory language. NEPA, 42 U.S.C. §4332(2)(C), requires an environmental impact statement only of "major Federal actions" significantly affecting the quality of the human

(footnote continued next page)

CONCLUSION

The decision of the Court of Appeals in this case is the first Circuit Court of Appeals decision on this important issue of law and public policy. The District Court decisions are divided. The Court of Appeals' decision conflicts with a decision of the Florida Supreme Court. Two very important statutes are involved, and the decision of the Court of Appeals, if left standing, will govern the practices

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environment." CEQ recognizes that the words "major" and "significant" are intended to imply thresholds of importance and impact that must be met before a statement is required. See 40 C.F.R. part 1500 et seq, including, without limitation, §1508.18 and §1508.27. Unlike NEPA, NHPA extends no discretion to federal agencies to determine whether the activity in question meets a certain threshold of significance if that activity affects National Register property. The lack of a qualifying word, such as "major," for actions covered by NHPA, is indicative of the broader reach of NHPA insofar as National Register properties are concerned. NHPA is explicit that "any" federal action is subject to the Advisory Council's procedures, if that action affects National Register property. See Environmental Law Institute, Federal Environmental Law (1974) at 1496.

of federal agencies with regard to the condemnation of National Register properties. Despite its precedental importance, the opinion of the Court of Appeals conflicts with the plain terms of 16 U.S.C. §470(F) and its implementing regulations, is contrary to the expressed Congressional policies of NHPA and departs from accepted principles of statutory construction.

We therefore respectfully conclude that this Petition for Writ of Certiorari should be granted.

Respectfully Submitted:

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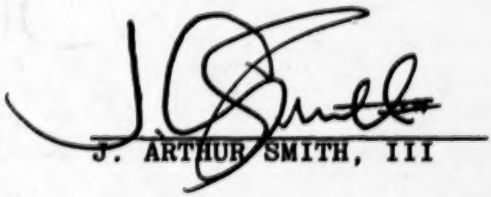
CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing have been mailed, postage prepaid, United States Mail, addressed to counsel of record at his post office address, Mr. Jacques Gelin, Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C., 20530, and that three (3) copies have been mailed, postage prepaid, United States Mail, to the Solicitor General, Department of Justice, Washington, D.C., 20530, this 27th day of May, 1981.



J. ARTHUR SMITH, III

Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, G.E. UITHOVEN, CARRIE UITHOVEN, DAVID ASHMORE, PAUL THORNE, AND JAMES L. YOUNG

Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

	PAGE
Opinion of the United States Court of Appeals for the Fifth Circuit	1
Memorandum of Decision, United States District Court for the Northern District of Mississippi, Eastern Division.	21
Order, United States District Court for the Northern District Of Mississippi, Eastern Division. .	32
Final Judgment, United States District Court for the Northern District of Mississippi, Eastern Division.	34
Judgment of the United States Court of Appeals for the Fifth Circuit	38
Order Denying Petition for Rehearing and Petition for Rehearing En Banc	40
Order Granting Stay of Mandate Pending Disposition by the United States Supreme Court	43
Pertinent Regulations of the Advisory Council on Historic Preservation.	46

United States v. 4.18 Acres of Land, More or Less, Situated in Idaho County, Idaho, et al, C. A. No. 3-74-33, (D.C. Idaho, 1974), Findings of Fact and Conclusions of Law 49

United States v. 4.18 Acres of Land, More or Less, Situated in Idaho County, Idaho, et al, C. A. No. 3-74-33, (D.C. Idaho, 1975), Amended and Supplemental Findings of Fact and Conclusions of Law 78

United States v. 4.18 Acres of Land, More or Less, Situated in Idaho County, Idaho, et al, C. A. No. 3-74-33, (D.C. Idaho, 1975), Judgment of Dismissal Without Prejudice. 91

UNITED STATES of America,
Plaintiff-Appellee,

v.

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, and F.E. Uithoven et al., Defendants-Appellants

No. 80-3707.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 13, 1981

Appeal from the United States Court for the Northern District of Mississippi.

Before GOLDBERG, GARZA and TATE, Circuit Judges.

GARZA, Circuit Judge:

We are squarely confronted with an issue of law which this court has never addressed: is alleged noncompliance by federal authorities with the mandate of Section 470f of the National Historic Preservation Act of 1966, [NHPA], 16 U.S.C. §470 et seq., a legally sufficient defense

to the condemnation of private property for use in a federal project under the Declaration of Taking Act, [DOTA], 40 U.S.C. §258a? Our answer depends upon a resolution of the tension between the vast discretionary condemnation power given the government under DOTA, and the pervasive reach of the NHPA's command that mitigation of adverse effect on the tangible evidences of our historic heritage be considered in the decision-making process surrounding federal projects.

I.

Condemnation cases usually revolve around a conflict between private and public purposes. Here, we deal with an enormous federal undertaking, the Tennessee-Tombigbee Waterway Project, and property owned by the Uithoven family[1] which the government has sought to include within a peripheral scheme to enhance the Columbus Lock and Dam segment of the project with recreational

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[1] Several persons were discovered to have leasehold interests, and were joined in the suit.

facilities.

The Uithoven property is located near the Tombigbee River in Clay County, Mississippi, and is within the area once occupied by the abandoned riverfront town of Barton, (ca. 1848-1870). Upon the tract sits a four-room, one-story nineteenth century dwelling known as Cedar Oaks. The U.S. Army Corps of Engineers seeks to incorporate this property into a "Barton Ferry Recreation Area" which would cover two other extinct riverfront townsites: Colbert (ca. 1830-1847), and Vinton, (ca. 1849-1900?). The Barton townsite and Cedar Oaks are listed on the National Register of Historic Places as within the Tombigbee River Multi-Resource District, a "zone" created for the purpose of listing historic sites in the project area.

The Uithovens were given notice in 1977 that the Corps intended to acquire

their property for use in the Barton Ferry grounds. They submitted an "Application to Exclude Property from Condemnation Proceeding" to the Attorney General of the United States. The application explained that the Uithovens operated the land as a tree farm, and that their crop was ready for harvest. It further stated that the family had established campsites and permitted church and youth groups to camp on the grounds without charge. The application concluded:

> Such exclusion would not affect the construction of the project. Such exclusion would allow two gentlemen in their sixties to continue development of the property at their own expense for public recreation, timber production and residence on the family property. The lands and homes have much meaning and inestimable value to the Uithovens. This Historic Site should not be destroyed when the Congressional policy is the preservation od (sic) such Historic Sites.

This plea apparently reached unreceptive ears, for on February 14, 1978, the United States filed a complaint and dec-

laration of taking in the district court below, together with a deposit of estimated just compensation covering the land. The court signed a judgment of the declaration of taking ten days later.

On April 6th and 14th, the Uithovens viled answers which raised four defenses to the taking: (1) that the complaint did not state a cause of action; (2) that it did not contain a short and plain statement of the use for which the property was taken; (3) that there was no public necessity for the taking; and (4) that the government had failed to comply with the provisions of NHPA. The government moved to strike these defenses and, after oral argument, the district court granted the motion. With regard to the last defense, the court stated:

> The government does not contend that the Corps of Engineers is not required to comply with The Act. As a matter of fact, the government claims

> that the Corps is now in compliance therewith.
>
> The government does contend, however, that it is not required to comply with the Act before it can exercise the right of eminent domain in the action sub judice.
>
> This argument appeals to the court.

Final judgment upon a stipulated just compensation was entered, and this appeal was taken.[2]

II.

The Uithovens urge us to hold that the district court erred in striking the NHPA-compliance defense as legally immaterial. The government responds with the assertion that its condemnation power may be exercised either before or after compliance with NHPA,

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[2] Following the judgment the Corps allowed F.E. Uithoven to continue living on the property, and allowed two other family members to make periodic visits. This policy came to an end when the Corps asked the Uithovens to completely vacate the property, terminating any right to co-possession. The district court granted a motion to extend co-possession until September 1, 1980, but denied another extension motion on September 2nd. We granted the Uithovens' subsequent request for a stay pending the disposition of this appeal.

and goes on to argue that it was in compliance with the act when the declaration of taking was filed in this case.

Our analysis must begin with an examination of NHPA, which is less familiar to federal courts than the venerable DOTA. The act has been called an attempt to provide "new scope and techniques for federal efforts to preserve cultural resources," enacted "[T]o meet the shortcomings of previous federal legislation and to help stem the loss of irreplaceable cultural resources." J.M. Fowler, Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law, 12 Wake Forest L.Rev. 31 (1976). The preamble declares the values to be promoted:

> The Congress finds and declares... that the historical and cultural foundations of the nations should be preserved as a living part of our community life and development in order to give a sense of orientation to the American People. 16 U.S.C. §470.

Section 470f of the act creates a mechanism to promote these values neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them, the National Register of Historic Places serving as the list of sites. This portion of the act provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

The government describes this provision as

an effort "to insure consideration of preservationist values by federal agencies ...." While the act may seem to be no more than a "command to consider," it must be noted that the language is mandatory and the scope is broad.[3]

The government admits both the applicability of the act and the necessity of the Corps' compliance; it disputes, however, any assertion that a failure to comply before the instituttion of condemnation proceedings under DOTA will afford a defense to the defendant-owner. In order to evaluate NHPA as a potential defense, we must examine certain provisions of DOTA and cases delineating their legal effect.

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[3] As one might gather from a reading of section 470f, the compliance procedure is complex, and will necessarily vary from situation to situation. Executive Order No. 11593, issued on May 13, 1971, and published in full immediately following 16 USCA §470, provides some detail. An exhaustive description of the requisite procedures can be found in Fowler, Federal Historic Preservation Law, supra. We will have no occasion to discuss them in the context of this case.

40 U.S.C. §258a sets out the procedure to be used in taking private land for federal purposes:

> In any proceeding in any court of the United States outside of the District of Columbia...instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause...a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.

It is the consequence in law of such a filing which has particular relevance here. Section 258a continues:

> Upon the filing said declaration of taking and of deposit [of estimated just compensation] ...title shall vest i the United States and said land shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation... shall vest in the persons entitled thereto.

[1] The government has cited a number of decisions discussing the effect of the last-quoted provision, and we are compelled to agree with the position which they cumu-

latively state. In a condemnation proceeding under Section 258a where the government is not already in possession of the property, the filing of a declaration of taking and deposit of estimated compensation vests title in the United States, accomplishing the taking. See Best v. Humbolt Mining Co., 371 U.S. 334, 340, 83 S.Ct. 379, 9 L.Ed.2d 350, 355 (1963); United States v. Dow, 357 U.S. 17, 23, 78 S.Ct. 1039, 1045, 2 L.Ed.2d 1109, 1115 (1958); Fulcher v. United States, 604 F.2d 295, 296 (4 Cir. 1979); United States v. 2,997.06 Acres of Land, More Or Less, in Marion County, State of Florida, 471 F.2d 320, 337 (5 Cir. 1972); Likins-Foster Honolulu Corp. v. Commissioner, 417 F.2d 285, 289 (10 Cir. 1969); Covered Wagon, Inc. v. Commissioner, 369 F.2d 629, 633 (8 Cir. 1966); Certain Land in City of Washington, D.C. v. United States, 355 F.2d 825, 826 (D.C.Cir. 1965). The district court, powerless to dismiss the proceedings, performs an almost

ministerial function in decreeing the transfer of title. See United States v. Cobb, 328 F.2d 115, 116 (9 Cir. 1964); United States v. 2,974 Acres, Clarendon County, South Carolina, 308 F.2d 641, 643 (4 Cir. 1962); United States v. Hayes, 172 F.2d 677, 679 (9 Cir. 1949); United States v. Carey, 143 F.2d 445, 450 (9 Cir. 1945).

[2] The sole defense which may be raised against the condemnation itself is that of lack of authority to take in the petitioner. In Dow, supra, the Supreme Court noted that "[T]he Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding 'ancillary or incidental to suits brought under other statutes.' " 357 U.S. 17 at 23, 78 S.Ct. 1039 at 1045, 2 L.Ed.2d 1109 at 1115. It is clear that a condemnee may challenge "the validity of the taking for departure from the statutory limits." Catlin v. United States, 324

U.S. 229, 240, 65 S.Ct. 631, 637, 89 L.Ed. 911, 919 (1944); See also Berman v. Parker, 348 U.S. 26, 35, 75 S.Ct. 98, 103, 99 L.Ed. 27, 39 (1954); Maiatico v. United States, 302 F.2d 880, 886 (D.C.Cir. 1962). A perusal of cases involving assertions of the defense of lack of authority reveals that federal courts do not second-guess governmental agencies on issues of necessity and expediency when condemnation is sought; such matters are within the discretion of the legislature or of administrative bodies by delegation, and the concept of justiciability limits judicial review to the bare issue of whether the limits of authority were exceeded. See generally Berman, supra; United States v. 2,606.84 Acres of Land in Tarrant County, Texas, 432 F.2d 1286 (5 Cir. 1970), cert. denied 402 U.S. 916, 91 S.Ct. 1368, 28 L.Ed.2d 658 (1971); O'Brien v. United States, 392 F.2d 949 (5 Cir. 1968); Swan Lake Hunting Club v. United States, 381 F.2d

238 (5 Cir. 1967); 2,953.15 Acres of Land, More or Less, in Russell County, State of Alabama v. United States, 350 F.2d 356 (5 Cir. 1965).

[3] When section 470f is considered as a potential defense to a DOTA condemnation against this background, we think it apparent that the Uithoven's argument must fail.[4]

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[4] The district court cited two opinions issued by district courts, one which supports the Uithoven's position and one which rejects it. In United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D. Idaho February 20, 1975), Judge J. Blaine Anderson ruled that where the United States Forest Service had not complied with section 470f procedures prior to the institution of a condemnation suit, the action was premature. In United States ex rel. TVA v. Three Tracts of Land, 415 F.Supp. 586 (E.D. Tenn. 1976), the district court dealt with the precise argument advanced by the Uithovens, ruling as follows:

> Executive Order No. 11593 and 16 U.S.C. §470(f) impose specific obligations on the heads of federal agencies with respect to sites, structures or objects which have been listed or may become eligible for listing in the National Register of Historic Places. Neither can be construed as limiting a federal agency's authority to acquire property through condemnation. The duties created in the statute and the executive order arise once a federal agency obtains ownership or control of property. Since condemnation is a common means

(footnote continued next page)

The filing of a declaration, by which title vests, is a neutral act vis-a-vis NHPA compliance procedures and the policy concerns behind them. Federal agencies are compelled to abide by the terms of the NHPA regardless of the public or private character of the property involved. Further, where it has been long established that the role of the district court in DOTA condemnations is limited to a bare consideration of the legal authority to take, and where the courts have been careful to refrain from considering matters of propriety, expediency and policy with regard to the use of the property sought, we conclude that only an express statement by Congress that NHPA noncompliance is a defense to a condemnation

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used to acquire ownership or control of property, it seems clear that neither the statute nor the executive order were intended by Congress or the President to operate as a defense in a condemnation proceeding. See Order of Friars v. Denver Urban Renewal Authority, 186 Colo. 367, 527 P.2d 804 (1974). 415 F.Supp. at 588.

Our decision in this case indicates agreement with the latter opinion.

itself would be sufficient to achieve that result. While it may seem that the asserted defense would promote the purposes of NHPA by creating a means of enforcement to give it "teeth," it is manifestly apparent that only Congress can make such a judgment.[5]

III.

[4] Our holding does not, however, imply that section 470f is a serpent without fangs as to federal planners bent on disregard of its mandate, and we have not completely resolved this litigation against the Uithovens. The government acknowledges in its brief that "judicial intervention is

---

[5] Our conclusion is bolstered by an analogous line of cases dealing with the effect of section 102 (2)(C) of the National Environmental Protection Act, [NEPA], 42 U.S.C. §4332(2)(C), which requires federal agencies to prepare environmental impact statements on "major federal actions significantly affecting the quality of the human environment." This provision has been held irrelevant to the validity of a condemnation under section 258a. See United States v. 178.15 Acres of Land, More or Less, Grayson County Virginia, 543 F.2d 1391 (4 Cir. 1976); United States, TVA v. Three Tracts of Land, Etc., Alabama, 377 F. Supp. 631, 637 (N.D. Ala. 1974).

appropriate to vindicate the purposes of the National Historic Preservation Act." It notes the DOTA provision that "the Court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner," 40 U.S.C. §258a, and admits that "[A]ccordingly, while a court is without power to stay the passage of title, it may withhold physical possession and enjoin construction or any activity that may disturb the environment, cultural or physical, pending compliance with [the] congressional mandate." See, e.g., United States v. 247.37 Acres in Clermont County, Ohio, 3 ERC 1098 (S.D. Ohio 1971). It is also argued that a condemnee might alternatively file a separate suit to enjoin a project until the NHPA has been complied with. See, e.g., Save the Courthouse Committee v. Lynn, 408 F.Supp. 1323 (S.D.N.Y. 1975).

We agree that a district court having before it a condemnation case may, pursuant to the power granted under the DOTA provisions quoted above, require compliance with section 470f and either withhold possession by the government or take appropriate injunctive action to enforce its order. The transfer of title is an environmentally neutral action which, as we have observed, does not implicate the values expressed in the NHPA; compliance with 470f, however, may be environmentally significant and is required by the express language of that section in any event. Thus, while the NHPA does not provide a legal shield of protection against the exercise of the federal condemnation power, it can provide the condemnee with a sword which he may use to seek judicial scrutiny of compliance with the congressional command that adverse impact upon historical features of the condemned land be mitigated. We have stripped the

Uithovens of their asserted shield, but they may still, if they choose, wield the sword to enforce compliance.

[5] The government argued on appeal that it has indeed fulfilled its duty under section 470f, and submitted numerous documents purporting to show that it has done so. The district court noted this claim, but made no express finding. We will not make this determination for the first time on appeal and decline to review the government's offerings, which are not contained in the record proper and should be submitted to the district court if it is called upon to decide the issue. That portion of the opinion and judgment below which strikes noncompliance with the NHPA as a defense to the condemnation itself will be affirmed, but that portion which leaves "only [the] question of just compensation for the court's consideration" will be vacated, and we remand the

cause so that the district court may determine, on petition of the Uithovens, whether compliance has taken place. If the court finds to the contrary, it must then decide what remedial action is appropriate.

AFFIRMED IN PART AND VACATED IN PART; REMANDED FOR FURTHER PROCEEDINGS.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v. CIVIL NO. EC 78-26-S
162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, and F. E. UITHOVEN, et al, MF 33-25-361-22(1)
CIVIL NO. EC 78-27-S
MF 33-25-361-22(2)
Defendants

MEMORANDUM OF DECISION

These actions involve the taking, by way of condemnation, certain lands in Clay County, Mississippi, by the United States for the use of the Corps of Engineers in the construction of the Tennessee Tombigbee Waterway Project.

The defendants' answers contain four defenses. The United States (hereinafter "Government") questions the legality of each defense and moves to strike.

The first two counts can be dealt

with rather quickly. First, the defendants contend that the complaint does not state a cause of action. Second, they contend that the complaint does not "contain a short and plain statement . . . of the use for which the property is taken".

The complaint is in a form approved by the Federal Rules of Civil Procedure. Rule 84 provides "[t]he forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Form 29 is the one to be used for a complaint in condemnation proceedings.

The complaint in each case appears to contain all information required in the form. The court finds the complaint in each case to be in all respects sufficient to state a good cause of action.

Defendants question the statement

incorporated in each complaint as to the purpose for which the property is being taken. Each complaint states the purpose of the taking is to acquire the property for the use of the Corps of Engineers in the construction of the Columbus Lock and Dam, a segment of the Tennessee-Tombigbee Waterway Project.

When the use is a public one, as here, the necessity or expediency of appropriating any particular piece of property is a legislative and not a judicial function. In Shoemaker v. United States, 147 U.S. 282 (1893), the Court said:

> The validity of legislative acts erecting such parks, and providing for their costs, has been uniformly upheld . . .
>
> [W]hile the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted;

> that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation be made.

147 U.S. at 297, 298.

The court will not go behind the declaration of the Secretary of the Army, the administrative officer involved in this action, where, as here, he is proceeding as prescribed by Acts of Congress. It has been held that "[t]he decision of the [secretary] is not open to judicial inquiry." United States v. 243.22 Acres of Land, 129 F.2d 678, 683 (2nd Cir. 1942), cert. denied sub. nom., 317 U.S. 698 (1943) City of Oakland v. United States, 124 F.2d 959, 964 (9th Cir.), cert. denied, 316 U.S. 679 (1942).

The defendants' third defense asserts that there is no public necessity for the taking.

The legislative authority and public

purpose having been established, the court's inquiry is completed. The determination that the use for the land being taken exists has been delegated to the administrative officer, the Secretary of the Army, and the court will not go behind his determination to inquire into his intention. United States, ex rel. TVA v. Welch, 327 U.S. 546, 551-52 (1946); Shoemaker v. United States, 147 U.S. 282 (1893); United States v. 6.74 Acres of Land, 148 F.2d 618, 619-20 (5th Cir. 1945); United States v. 187.40 Acres of Land, 381 F.Supp. 54, 57 (M.D. Pa. 1974).

In Berman v. Parker, 348 U.S. 26 (1954) the court said:

> It is not for the court to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of the land to be taken for the project and integrated plan rests in the discretion of the legislative branch.

348 U.S. at 35-36

The claim that the taking is not necessary for the intended public purpose does not present a legal defense to the taking.

The defendants' fourth defense questions the right of the Government to take the land which has been listed on the National Register of Historic Places under the provisions of the National Historic Preservation Act of 1966, 16 U.S.C. §§ 461, et seq. (hereafter the "Act").

The Register carries the sites here involved under the designation "Colbert and Barton Townsites". This defense questions that right of the Government to institute condemnation proceedings without prior compliance with the provisions of Executive Order 11593, issued May 13, 1971, pursuant to the Act. Defendants claim to have information from personnel at the Advisory Counsel on Historic Preservation,

that the Corps of Engineers is not in compliance with certain inter-agency agreements designed to comply with the requirements of 16 U.S.C. §470(f), which provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

The government does not contend that the Corps of Engineers is not required to comply with the Act. As a matter of fact, the government claims that the Corps is

now in compliance therewith.

The government does contend, however, that it is not required to comply with the Act before it can exercise the right of eminent domain in the action sub judice.

The argument appeals to the court. There must be many historic sites, either presently listed or qualified for listing in the Register. To place a burden such as defendants propose on the Corps of Engineers in the acquisition of land for the use in the Tennessee-Tombigbee Waterway Project would necessarily impede and delay the completion of the project.

Each party has cited a United States District Court case to sustain his position. Defendants cite a case from the District of Idaho, United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D. Idaho Feb. 20, 1975). The government cites a case from the Eastern District of

Tenneessee, United States, ex. rel. T.V.A. v. Three Tracts of Land, 415 F.Supp. 586 (E.D. Tenn. 1976).

In the Idaho case, District Judge J. Blaine Anderson hald that the Forest Service had not complied with the regulations of the Advisory Council prior to the institution of the suit and that the action was premature.

In the Tenneessee case, the defense was made that the property was listed on the National Register of Historic Places pursuant to 16 U.S.C. § §470(a), et. seq. and that TVA had not complied with the provisions of 16 U.S.C. §470f or with the provisions of Executive Order No. 11593.

Honorable Robert F. Taylor, District Judge, held:

> Executive Order No. 11593 and 16 U.S.C. 470f impose specific obligations on the heads of federal agencies with respect to sites, structures or objects which have been listed or may become eligible for listing in the National Register

> of Historic Places. Neither can be construed as limiting a federal agency's authority to acquire property through condemnation. The duties created in the statute and the executive order arise once a federal agency obtains ownership or control of property. Since condemnation is a common measure used to acquire ownership or control of property, it seems clear that neither the statute nor the executive order were intended by Congress or the President to operate as a defense in a condemnation proceeding. See Order of Friars v. Denver Urban Renewal Authority, 527 P.2d 804 (Colo. 1974).

451 F.Supp. at 588.

The court agrees with Judge Taylor's reasoning on the issue and adopts it as its own.

The governments' motion will be sustained, leaving only the question of just compensation for the court's consideration.

The government's motion to strike was directed only to the answer filed by

defendant T. E. Uithoven. The other defendants are said to have an interest in the same land in which defendant T. E. Uithoven has an interest. The other defendants have answered since the court heard the motion as to defendant T. E. Uithoven, and their answers contain the same defenses as the T. E. Uithoven answer. In order to expedite the matter, the court's decision relates to all answers. Rule 12(b) provides that the court may proceed on its own motion in matters such as now being considered. The Court's order will relate to all answers filed.

An appropriate order will be entered by the court.

This 7th day of July, 1978.

s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTIRCT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff	CIVIL NO. EC 78-26-S
vs.	MF 33-25-361-22(1)
162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, and F. E. UITHOVEN, et al, Defendants	CIVIL NO. EC 78-27-S MF 33-25-361-22(2)

ORDER

Pursuant to the Memorandum of Decision this day released herein, it is

ORDERED that the answers filed in the above-captioned and numbered actions by defendants, G. E. Uithoven and wife, Carrie H. Uithoven, T. E. Uithoven, Paul Thorne, David Ashmore, and James L. Young, shall be and the same are stricken for failure to plead a sufficient defense.

IT IS FURTHER ORDERED that the striking of said answers shall be without prejudice to the granting of just compens-

ation to said defendants for the taking of the property sought in said actions.

This 7th day of July, 1978.

s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

UNITED STATES OF AMERICA,

PLAINTIFF

VERSUS

CIVIL ACTION NO. EC78-27-S-0
TRACT NO. 736

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI AND F. E. UITHOVEN, ET AL

DEFENDANTS

FINAL JUDGMENT

TRACT NO 736

This cause was heard on the motion of the United States of America, plaintiff herein, and upon the Stipulation of the said parties filed herein, and the Court being fully advised in the premises finds;

1. That G. E. Uithoven and Carrie H. Uithoven were the owners on the date of taking of the land described as Tract No. 736, more particularly described in the

Declaration of Taking filed herein; that the former owners have entered into a Stipulation, filed in this Court, agreeing that the said sum of Twenty-two Thousand Nine Hundred Dollars ($22,900), inclusive of interest, shall be full and just compensation and in full satisfaction of any and all claims of whatsoever nature against the United States of America by reason of taking of the said estate in Tract No. 736 and all appurtenances thereto belonging as described in the Complaint and the Declaration of Taking filed herein; and from said sum the owners shall pay any and all liens, taxes, and encumbrances against said land existing at the time of taking.

2. That the sum of Fifteen Thousand Three Hundred Forty-one Dollars ($15,341) was originally deposited in the estate in Tract No. 736; that it is necessary for the plaintiff to deposit an additional

sum of Seven Thousand Five Hundred Fifty-nine Dollars ($7,559) in the Registry of the Court.

3. No sums whatever have been deducted from the Fifteen Thousand Three Hundred Forty-one Dollars ($15,341) deposited.

4. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, entry of judgment on Tract 736 is appropriate to avoid any further delay of any appeal which the landowners may wish to make, there being no just reason for further delay, and entry of judgment is hereby so directed on Tract 736.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court

1. That the United States of America, plaintiff, shall pay into the Registry of the Court the sum of Seven Thousand Five Hundred Fifty-nine Dollars ($7,559).

2. That the Clerk of the Court is authorized to disburse on behalf of the owners, G. E. Uithoven and Carrie H. Uithoven, all funds deposited to the credit of Tract No. 736, plus any interest accrued on said funds.

3. That said sum of Twenty-two Thousand Nine Hundred Dollars ($22,900) is hereby fixed as the full just compensation by reason of the taking of the estate of Tract No. 736, and all appurtenances thereto as described in the Complaint and Declaration of Taking filed herein.

4. That title to Tract No. 736 as set forth in the Declaration of Taking is vested in the United States of America.

So Ordered this 19th day of August, 1980.

s/ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-3707

D. C. Docket No. EC78-27-S-O

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

162.20 ACRES OF LAND, more or less, situated in CLAY COUNTY, STATE OF MISSISSIPPI and F.E. Uithoven, et al,

Defendants-Appellants.

Appeal from the United States Distirct Court for the Northern District of Mississippi

Before GOLDBERG, GARZA and TATE,

Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the

United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, vacated in part, and that this cause be, and the same is hereby remanded for further proceedings to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear his own costs on appeal in this Court.

MARCH 13, 1981

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

No. 80-3707

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, and F.E. UITHOVEN, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 3-13-81, 5 Cir., 198_, ____F.2d__).

(April 15, 1981)

Before GOLDBERG, GARZA and TATE,

Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Adminsitrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/ Reynaldo Garza
United States Circuit Judge

CLERK'S NOTE
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

April 29, 1981

GILBERT F. GANUCHEAU
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS,LA. 70130

Mr. J. Arthur Smith, III
Attorney at Law
524 France Street
Baton Rouge, LA 70802

No. 80-3707 - USA v. 162.20 Acres of Land

MANDATE STAYED TO AND INCLUDING
May 28, 1981

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the Clerk of Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for

the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, F.R.A.P.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to cerfity the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By s/ Fred Alfortish
Deputy Clerk

Encls.

cc: Mr. Thomas R. Trout
Mr. Jacques B. Gelin

The provisions of the regulations of the Advisory Council on Historic Preservation which are involved in this case are quoted hereinafter.

36 C.F.R. §800.2(c)

(c) "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are: (1) Directly undertaken by Federal agencies; (2) supported in whole or in part through Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance; (3) carried out pursuant to a Federal lease,

permit, license, certificate, approval, or other form of entitlement or permission; or, (4) proposed by a Federal agency for Congressional authorization or appropriation...

* * * *

36 C.F.R. §800.3(a)

(a) ...An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of the National Register. ... An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or farther removed in distance, but are still reasonably foreseeable. ...

* * * *

36 C.F.R. §800.4 Federal Agency responsibilities

As early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment, the Agency Official shall take the following steps to comply with the requirements of Section 106 of the National Historic Preservation Act and Section 2(b) of Executive Order 11593. ...

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	) Civil No. 3-74-33
4.18 ACRES OF LAND, more or less, situated in Idaho County, Idaho; SCOTT STANFORD HARRIS and CONNIE HARRIS, husband and wife; GRETCHEN LOUISE HARRIS and JOHN DOE HARRIS, her husband, if any; BILL HARRIS and JANE DOE HARRIS, husband and wife; HAZLE HARRIS REYNOLDS and ROBERT REYNOLDS, wife and husband; IDAHO COUNTY; ANY AND ALL UNKNOWN OWNERS, Defendants	) FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for hearing upon the defendant Harris' Motion to Vacate Judgment on Declaration of Taking and Order for Delivery of Possession on the 24th and 26th day of July, 1974, the plaintiff appearing and being represented by Paul L. Westberg, Assistant United States Attorney for the District of Idaho, the defendants, Scott

and Gretchen Harris appearing and being represented by Hebert W. Rettig and W. F. Schroeder, and the defendants Idaho County having made no appearance; and both parties having put on evidence and the Court being otherwise fully advised, hereby makes the following:

FINDINGS OF FACT

1. This action was originally brought by the United States to condemn the above-described property, which is a portion of a 160-acre parcel of land known as Burgdorf or Burgdorf Hot Springs, owned by Scott and Gretchen Harris and situated approximately 35 miles north of McCall, Idaho, within the Payette National Forest. The estate sought to be taken is a perpetual easement for use as an improved road in the Forest Service highway system. The defendants are, and at the relevant time pertinent to this action were, residents of the State of Idaho.

The government filed its Complaint, Judgment on Declaration of Taking, and Order for Delivery of Possession on June 3, 1974. The defendants, Scott and Gretchen Harris, on June 25, 1974, filed their verified Answer and Motion to Vacate Judgment of Taking and Order for Delivery of Possession, contesting the validity of this action. The Court's findings and conclusions set forth hereinafter are directed to the questions raised by defendants' motion.

2. The road which the Forest Service wishes to improve, often called the Burgdorf-French Creek Road, was originally constructed in the 1870's as a mining road to provide access from the Salmon River into the gold mining areas around Warren, Idaho. It is a 22-mile stretch of unimproved dirt and gravel road running North and South between the Burgdorf Junction on the Warren Wagon

Road and the Salmon River. It lies entirely within the Payette National Forest and has always been open for public use, save for closure during the winter months due to snow. Portions of the road pass over private land, including approximately one-half mile of the Burgdorf property. It is actually a county road, but Idaho County does not oppose the improvement of it.

3. Burgdorf was homesteaded by Fred C. Burgdorf, a German emigrant, in the 1870's as an early day resort. He eventually built a hotel, his home, a general store and a log structure swimming pool supplied by natural warm water and the resort flourished during the mining boom around the turn of the century. Today the area still remains as a popular tourist attraction and almost all of the structures and their furnishings remain in their original

condition or are presently being rebuilt by the Harrises, with the same material and tools and in the same manner as originally constructed. The Harrises reside on the property during the summer. The 160-acre, pioneer-styled homestead has not really changed over the years. The only new additions to the surrounding area have been a Forest Service campground and summer home area and the logging traffic from the substantial timber sales by the Forest Service to the north of Burgdorf.

4. The existing road, as it comes into Burgdorf, makes a 90° curve. The swimming pool and its surrounding buildings abut the existing road to the inside of the curve. The general store also abuts the road on the outside of the curve. The Burgdorf Hotel lies back from the road as do the other buildings. The close proximity between the road and those areas most frequented by tourist traffic does create a safety

hazard as one can step from the general store or the swimming pool area directly onto the road surface. Persons visiting Burgdorf are freguently crossing the road. There are no sidewalks or curbs. A traffic sign has been erected by Scott Harris asking motorists to slow down when passing through. Logging trucks pass through Burgdorf on the existing road approximately every fifteen minutes. However, there have been no known or reported traffic accidents in Burgdorf. At present, approximately 20 to 25 persons of all ages visit the site per day during the summer months.

5. Beginning in 1963 or 64 the United States, through the Forest Service, began negotiating with Mr. Bill Harris and Mrs. Hazle Smith (then Mrs. Bill Harris, named in the complaint as Hazle Harris Reynolds) to acquire land that might be appropriate for improvement

of the Burgdorf-French Creek Road as it passes over the Burgdorf property, or for an alternate route.

6. In 1968, Mr. Bill Harris and Mrs. Smith conveyed their fee interest in the 160-acre property to their children, Scott and Gretchen Harris, subject to the condition that the children had no right to voluntarily convey the property until 1978.

7. In 1969, Mrs. Smith authorized construction of a gravel bypass road across the property through the open meadow to the west of the buildings and swimming pool. The bypass road was constructed by a stone mining company, Lewiston Lime Co., for their use as there had been complaints about the dust caused by the trucks as they passed through Burgdorf. The company graveled the road and it was used by the public as well. However, in the fall of 1969

or the spring of 1970, Mrs. Smith caused the entrance to the bypass road to be fenced off, prohibiting its use. The bypass has not been used since and at this time all traffic on the Burgdorf-French Creek Road must pass through Burgdorf.

8. Negotiations with the defendants, or some of them, for the purchase of an easement across the Burgdorf property by the government continued half-heartedly until the summer of 1969. At this time the Forest Service felt that due to the increased tourist and logging traffic in the area, more positive steps toward improvement of the road were necessary. The Forest Service requested permission to do a survey of the bypass road constructed by the Lewiston Lime Co. and a couple of other alternate routes. Mrs. Smith voiced her objections to the proposal of improving the bypass road, but in the summer of 1970 permitted the Forest

Service to do feasibility surveys and materials tests of the bypass road and two or three alternate routes further to the west of the buildings and one route to the east of the buildings.

9. In all, the Forest Service surveyed and considered five alternatives which they felt could be used to improve the existing road as it crosses the Burgdorf property. The first alternative was to improve the existing road along the same route which it now takes through the property. This alternative was rejected as unsafe and because it would continue the undesirable location of the road as it passes through Burgdorf. The second alternative, designated as "Alternative "A", on Defendants' Exhibit #1, was to construct a route along substantially the same route as the bypass road

constructed by the Lewiston Lime Co. It was estimated that this route would involve construction of 3,454 feet of new roadway at an estimated cost of $109,864. This route would not require any extensive filling nor would a bridge have to be constructed across the creek which flows through the property. The thrid alternative, designated as "Alternate 'B'", was to construct a new route farther to the west of Burgdorf than "Alternate 'A'". This route would involve construction of 3,650 feet of new roadway at an estimated cost of $129,780. The route would be over a more swampy portion of the meadow and would require more extensive filling. The fourth alternative, designated as "Alternative 'C'", was to construct a route more lengthly and much farther to the west around the meadow and through a

wooded area. This route would also require crossing the creek in two places. It was estimated that the road length of this alternative would be 9,652 feet at a cost of $363,100. The fifth alternative, "Alternative 'D'", was to bypass Burgdorf to the east and, through no figures as to length and cost were furnished, was found unfeasible due to cost and engineering problems. "Alternate 'A'" was ultimately selected by the Forest Service as the most desirable route and is the route the government seeks by this action.

10. The Forest Service plan to improve the Burgdorf-French Creek Road involves eventually paving the road from Burgdorf Junction to the Salmon River. The improved road would be a two-lane road with a designed speed of 35 -55 mph. The first stage of the project, to pave approximately seven miles of the road from the Burgdorf Junction north, calls

for construction of the proposed route, "Alternate 'A'", across the Burgdorf property. The road would be open for public used by recreationists and sportsmen, and would provide access to over 200 million board feet of timber which is to be logged in the future and would also be used for forest fire control. But, even after completion, the road would only be open during the summer months.

11. The defendants have opposed the project to improve the existing road from its inception, at least insofar as the project would require a route across the Burgdorf property. Mrs. Smith on numerous occasions has written the Idaho congressional delegation requesting assistance in stopping or re-routing the project. There has been some public opposition to the project, evidenced by the petitions entered into evidence and

the editorial in the Free Press, a NAMPA, Idaho, newspaper. However, most of the oposition seems to have come at the instance of the defendants rather than as independent public opposition, and is directed at the proposed route across the Burgdorf property rather than against the entire project to improve the road. A Forest Service paving project which will pave approximately six miles of the Warren Wagon Road up to the Burgdorf Junction, within a mile of Burgdorf, received no public response to a request for any desire for a public hearing concerning that project.

12. In September of 1971, the Director of the Idaho State Historical Society, Dr. Merle Wells, caused a nomination form to be completed and submitted to the Advisory Council on Historic Preservation, a body created by the National Historic Preservation Act of 1966, 16 U.S.C. §470 et seq. (Plaintiff's

Exhibit #30). Approximately 120 acres of the Burgdorf property was nominated for inclusion in the National Register of Historic Places, including all of the resort buildings. On April 14, 1972, Burgdorf was entered on the National Register and has maintained that status to date.

13. Shortly thereafter, the designation of Burdorf as a historical site and its listing on the National Register came to the attention of the Forest Service. Mr. Frank Fry, a realty specialist with the Forest Service, contacted Dr. Wells and with him viewed the Burgdorf site in July of 1972. Mr. Fry pointed out where the proposed road would be located and, in particular, that it would be located substantially along the roadbed of the bypass road constructed by Lewiston Lime Co. The alternative routes considered by the Forest Service were discussed in

general terms.

14. Both Dr. Wells and Mr. Fry were familiar with procedures published in 36 FR 3312 on February 20, 1971, as notices of procedures for the protection of the National Register properties. Dr. Wells and Mr. Fry concluded that the proposed road would have a beneficial effect on the Burgdorf site because it would take the heavy tourist and logging traffic away from the buildings. It is Dr. Wells' present belief that an improved road over the proposed route, "Alternate 'A'", would have some adverse effect on the Burgdorf site due to some alteration of the property by construction of the road and it will introduce some people and traffic to the area which will cause introduction of visual, audible or atmospheric elements that are out of character with the property and its setting. Dr. Wells did not relay this

belief on to the Forest Service or Mr. Frey, but did state that the most desirable route would be to stay away from the buildings as far as would be possible. Dr. Wells still regards the existing road through the resort area to be very undesirable, with an adverse effect on the Burgdorf site.

15. Negotiations with Scott and Gretchen Harris for the purchase of an easement over the proposed route, "Alternate 'A'", were discontinued in the fall of 1972, after the government's offered consideration was rejected. Thereafter, the Forest Service began preparing the necessary steps for condemnation of that portion of the Burgdorf property sought by this action. By the end of November, 1973, Mr. Fry and Mr. Clifford Lee, a Forest Service Engineer, had prepared and the local Forest Service officials had approved a Condemnation

Report. (Plaintiff's Exhibit #34). This report was submitted to officials in Washington, D.C., in December, 1973, with the request that the property be taken.

16. In March of 1974, Scott Harris, through his attorney, offered to grant the government an easement without consideration across the westernmost portion of the Burgdorf property. This offer was rejected by the government. On April 19, 1974, the Declaration of Taking was signed.

17. The Forest Service did not prepare an environmental impact statement pursuant to 42 U.S.C. §4332(2)(c), Section 102 (2)(c) of the National Environmental Policy Act of 1969, for the Burgdorf-French Creek Road improvement project. A rather extensive and detailed Multiple Use Survey Report outlining recommendations for construction and the environmental

and commercial effects the project would have on the area was prepared as part of the condemnation report. The Forest Service is in the process of preparing an environmental impact statement for the five-year plan for future timber sales to the north of Burgdorf.

18. On August 3, 1973, the Forest Service published notice in 38 FR 20918 of revisions to the Forest Service Manual concerning guidelines to be followed by Forest Service officials in determining the need for and preparation of environmental impact statements.

19. On January 25, 1974, the Advisory Council on Historic Preservation adopted revised "Procedures for the Protection of Historic and Cultural Properties" to be followed by all federal agencies whose undertakings or projects may have an impact on potential or existing National Register properties.

See 36 CFR §800 et seq.

20. At some time prior to February 19, 1974, Scott Harris informed the Advisory Council on Historic Preservation of the undertaking to improve the Burgdorf-French Creek Road as it crosses the Burgdorf property. In response to this, on the above date Ann Webster Smith, Director of the Office of Compliance of the Advisory Council, wrote to Mr. F. Leroy Bond, Director of the Division of Recreation of the Forest Service, requesting a report on the Forest Service's compliance with the National Historic Preservation Act. On March 21, 1974, Mr. Feuchter, for Mr. Bond, replied informing the Advisory Council that Dr. Wells in July of 1972, had determined that the road relocation would have beneficial effect on the property and that due to that determination, the undertaking proceeded. On April 10, 1974, Dr. Wells wrote to the Advisory Council, and in response to their inquiry

concerning the project, stated that the proposed road would be an improvement over the existing road. However, Dr. Wells also stated that at the time of his trip with Mr. Fry to the property, the Forest Service was not prepared to offer any other alternatives to the proposed road. Dr. Wells went on to state that a route farther away from the town would further enhance the historic value of the site and that any possible alternatives should be considered. On May 13, 1974, Ann Webster Smith again wrote to Mr. Bond and, referring to Dr. Wells' letter, stated that alternatives to the proposed route, upon her information, were not considered. She further stated that it appeared that the undertaking would have an effect on the Burgdorf site and therefore 36 CFR §800.4(c) must be complied with. On July 4, 1974, Mr. Feuchter again responded that five alternatives were in fact

considered, and all five were found not to be adverse. However, Mr. Feuchter stated that he was asking the Regional Forester in Salt Lake City, Utah, to furnish his documentation of the determination of no adverse effect and asking the Advisory Council's review of that determination in compliance with 36 CFR §800.4. The record in this case does not indicate any further correspondence between the Advisory Council and the Forest Service, whether documentation of the type referred to was in fact sent, or if so, whether the Advisory Council objected to the finding of no adverse effect within 45 days of the receipt of such documentation as required by 36 CFR §800.4(d).

21. The Department of Transportation has no connection with the Forest Service project to improve the Burgdorf French Creek Road, as the funds for the

project would come entirely from the Forest Service.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over these parties and to hear and determine this matter.

2. The National Parklands Act, 23 U.S.C. §138, is not applicable to the Burgdorf-French Creek Road improvement project.

3. The Forest Service was not required to draft an environmental impact statement in connection with the Burgdorf-French Creek Road improvement project. 42 U.S.C. §4332 (2)(c) and the applicable guidelines in the Forest Service Manual published in 38 FR 20918 require preparation of an environmental statement for "major Federal actions significantly effecting the quality of the human environment." In addition, the Forest Service guidelines require preparation of

such statements for major federal actions which are "highly controversial." While the proposed project may be considered a "major" action when considered in its totality, there is substantial evidence to support the judgment by the Forest Service that the project will not "significantly effect the quality of the human environment," The improvement to the road will not significantly affect Burgdorf itself. There has always been a substantial amount of tourist and recreationist traffic in the area. There is nothing to indicate that as a result of the road improvement traffic will increase greatly. There is no evidence that the project will trigger land development. Also, as the Multiple Use Survey points out, the road will be constructed and improved with the least possible effect upon the wildlife, fisheries and vegetative resources exist-

ing along the route. Neither is the project one which is "highly controversal."

4. The National Historic Preservation Act, 16 U.S.C. §470, et seq. and the regulations published by the Advisory Council on Historic Preservation, on January 25, 1974, 36 CFR §800 et seq., are applicable to the proposed project to improve the Burgdorf-French Creek Road, as it crosses the Burgdorf property.

5. Based upon the evidence presented, the Court concludes that the Forest Service had not fully complied with the controlling regulations of the Advisory Council prior to April 19, 1974. The Forest Service had previously found that the proposed route would have a beneficial rather than adverse effect upon the Burgdorf property. However, 36 CFR §800.4(d) requires that after a finding that an undertaking will have any effect

upon a National Register property, the documentation supporting such a finding must be forwarded to the Advisory Council for review. That section further provides that unless the Advisory Council notes an objection to the finding of no adverse effect within 45 days of the receipt of adequate documentation, the undertaking may proceed. The Advisory Council began inquiring as to compliance with the appropriate regulations and questioning the finding of no adverse effect prior to the date of Declaration of Taking was signed. The July 8th letter by Mr. Feuchter indicates that the Forest Service had failed to comply with the regulations. Since the Advisory Council had not been given the opportunity to review the findings of no adverse effect and had in fact questioned the finding, the Advisory Council should have been given the opportunity prior to any final agency

action concerning the project. It follows therefore, that the Declaration of Taking and the filing of this action were premature.

6. It is, therefore, the judgment of this Court that the Declaration of Taking and Order for Delivery of Possession be held in abeyance until such time as counsel for both parties can augment the record in this matter either by presentation of evidencepursuant to stipulation of counsel or by a further evidentiary hearing. Since it appears from the evidence that compliance with the appropriate regulations was taking place at the time the hearing in this matter was had, the Court invites evidence on the following points: (1) whether documentationof the Forest Service finding was in fact sent to the Adivsory Council for review; (2) if so, whether the Advisory Council objected to such a finding within 45 days of its receipt. If such further

evidence discloses that the Forest Service has not sent documentation of the finding of no adverse effect, or, if such documentation was sent but the finding was objected to by the Advisory Council, the Declaration of Taking and Order for Delivery of Possession will be vacated and this action dismissed, as there are adequate procedures in the Advisory Council regulations for resolution of the dispute between the agencies. If, on the other hand, such evidence shows that after receipt of the documentation, the Advisory Council failed to object within 45 days or concurred in the finding, the defendants' motion will be denied and this action allowed to proceed.

The motion to dismiss defendants' application for relief made by the government at the conclusion of the evidence presented by the defendants is DENIED.

Subsequent to the preparation of these Findings and Conclusions but prior to signature of the Court and filing and service, the goverment filed its motion to reopen to submit evidence that while this matter was under submission, the Forest Service and Advisory Council on Historic Preservation had reached an agreement satisfying the requirements of the Code of Federal Regulations.

IT IS THEREFORE ORDERED that defendants may file appropriate responses to the motion to reopen by way of affida- its opposing the reopening within ten (10) days from the date hereof and the plaintiff may respond thereto within five (5) days thereafter. If the Court concludes that reopening is appropriate, an evidentiary hearing will be set at the earliest possible date unless the parties stipulate in writing to augment the record by the submission of relevant

documents, stipulations of fact and additional memoranda of authorities.

Objections to the Findings and Conclusions heretofore entered or requests for additional findings and conclusions may be filed herein by either party within fifteen (15) days from the date hereof and the same will be heard and determined by the Court at the reopened hearing or upon final submission.

DATED this 12th day of November, 1974.

s/ J. Blaine Anderson by F.M.J.
J. BLAINE ANDERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	) Civil No. 3-74-33
4.18 ACRES OF LAND, more or less, situated in Idaho County, Idaho; SCOTT STANFORD HARRIS and CONNIE HARRIS, husband and wife, GRETCHEN LOUISE HARRIS and JOHN DOE HARRIS, her husband, if any; BILL HARRIS and JANE DOE HARRIS, husband and wife; HAZLE HARRIS REYNOLDS and ROBERT REYNOLDS wife and husband; IDAHO COUNTY; ANY AND ALL UNKNOWN OWNERS, Defendants	) AMENDED AND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for hearing upon the defendant Harris' Motion to Vacate Judgment on Declaration of Taking and Order for Delivery of Possession on the 24th and 26th days of July, 1974. Prior to entry of the Court's Findings of Fact and Conclusions of Law on the matters presented at the hearing

on the above dates, the United States moved to reopen the evidentiary hearing for the purpose of offering additional evidence concerning compliance by the Forest Service with the regulations enacted pursuant to the National Historic Preservation Act, 16 U.S.C. §470, et seq. The Court entered its findings and conclusions on November 12, 1974, but allowed the parties to file briefs on the question of whether this matter should be reopened. By Order dated December 10, 1974, the motion to reopen was granted and additional evidence was received, over the objection of the defendants, at a hearing held on December 23, 1974. Following that hearing the Court called for briefs on the subject of the next procedural step to be followed in light of the evidence submitted and also allowed the parties to submit their objections to the Court's findings and conclusions dated November

12, 1974. Based upon all evidence received to date, the briefs and the arguments of both parties, the Court therefore makes the following Amended and Supplemental Findings of Fact numbered 20 through 24, inclusive, and Conclusions of Law numbered 5 through 9, inclusive.

FINDINGS OF FACT

20. At some time prior to February 19, 1974, Scott Harris informed the Advisory Council on Historic Preservation of the undertaking to improve the Burgdorf-French Creek Road as it crosses the Burgdorf property. In response to this, on the above date Ann Webster Smith, Director of the Office of Compliance of the Advisory Council, wrote to Mr. F. Leroy Bond, Director of the Division of Recreation of the Forest Service, requesting a report on the Forest Service's compliance with the National Historic

Preservation Act. On March 21, 1974, Mr. Feuchter, for Mr. Bond, replied informing the Advisory Council that Dr. Wells in July of 1972, had determined that the road relocation would have a beneficial effect on the property and that due to that determination, the undertaking proceeded. On April 10, 1974, Dr. Wells wrote to the Advisory Council, and in response to their inquiry concerning the project, stated that the proposed road would be an improvement over the existing road. However, Dr. Wells also stated that at the time of his trip with Mr. Fry to the property, the Forest Service was not prepared to offer any other alternatives to the proposed road. Dr. Wells went on to state that a route farther away from the town would further enhance the historic value of the site and that any possible alternatives should be considered. On

May 13, 1974, Ann Webster Smith again rote to Mr. Bond and, referring to Dr. Wells' letter, stated that alternatives to the proposed route, upon her information, were not considered. She further stated that it appeared that the undertaking would have an effect on the Burgdorf site and therefore 36 CFR §800.4 (c) must be complied with. On July 4, 1974, Mr. Feuchter again responded that five alternative were in fact considered, and all five were found not to be adverse. However, Mr. Feuchter stated that he was asking the Regional Forester in Salt Lake City, Utah, to furnish his documentation of the determination of no adverse effect and asking the Advisory Council's review of that determination in compliance with 36 CFR §800.4. Accordingly, the Regional Forester's Office in Utah forwarded to Ann Webster Smith its documentation of its determination of no adverse effect

for review by the Office of Compliance of the Advisory Council. Such documentation consisted of a letter and protion of the Condemnation Report.

On August 15, 1974, Ann Webster Smith responded stating that the Executive Director noted an objection to the determination of no adverse effect, based upon a finding that the proposed road would require the alteration of the Burgdorf property introducing a visual element out of character with its historical setting. The Advisory Council therefore requested that the Forest Service comply with the procedures outlined in 36 C.F.R. §800.4(e) and that the Forest Service arrange for on-site inspection with a representative of the Executive Director pursuant to 36 C.F.R. §800.5.

On August 30, 1974, Louis Wall from the Advisory Council, Harold Bolt of the

Forest Service, Payette National Forest, Clifford Lee of the Forest Service, Payette National Forest, Frank Fry of the Forest Service, Payette National Forest, Dr. Merle Wells, Dr. Evan DeBloois, Regional Archeologist for the Forest Service, Bill Meiners, representing Scott Harris, Scott Harris, Franklin Jones, an interested citizen, and Lewis Crea of the Idaho County Board of Commissioners, were present at an on-site meeting at Burgdorf pursuant to 36 C.F.R. §800.5. The group inspected the location of the proposed road and thereafter met to formulate possible alternatives or mitigation actions which could be utilized. As a result of that meeting, the Forest Service made certain mitigating proposals on construction of the proposed road and submitted them to Ms. Smith. By letter dated September 30, 1974, Ms. Smith responded to the Regional

Forester's Office in Utah that the proposals made had been accepted and enclosed a Memorandum of Agreement for the project. This agreement was then signed by the Executive Secretary of the Advisory Council, the Forest Service, and Dr. Wells and subsequently approved by the Chairman of the Advisory Council on Historic Preservation.

21. The Memorandum of Agreement as approved by the Chairman of the Advisory Council provides the following actions will sufficiently mitigate any adverse impact of the proposed project on the Burgdorf property:

> "a. The proposed road will be designed and built to maintain a low profile across the historic property in order to be as unobtrusive as possible. Its surface will be of a color similar to the present unpaved road through Burgdorf.
>
> b. Dust control methods not now possible can be used on the proposed road to reduce this impact on the site. Such dust

control measures will be limited to water or chemicals that will not conflict with the natural appearance of the road.

c. The roadway will not be paved at this time. If a need for paving the road at some future date should occur, the Forest Service shall seek the Advisory Council's comments before proceeding.

d. The proposed road will remove through traffic from the center of Burgdorf, eliminating the existing safety hazards of the present alignment.

e. The proposed road will be built along the existing bypass road to minimize visual impact." (Plaintiff's Exhibit No. 8, at the December 23, 1974, hearing)

22. There is some minor variance between the Memorandum of Agreement, part e, and Schedule B attached to the government's complaint in this action, showing the route of the proposed road, but such variance is not deemed to be a substantial or material breach of part e.

23. The Department of Transportation has no connection with the Forest Service project to improve the Burgdorf-French Creek Road, as the funds for the project would come entirely from the Forest Service.

24. The taking of possession by the plaintiff has been postponed throughout these proceedings and the defendant landowners have been in full, complete and undisturbed possession of the property from the commencement of these proceedings to the date of the entry of judgment based hereon.

CONCLUSIONS OF LAW

5. The Forest Service had not complied with the regulations of the Advisory Council prior to April 19, 1974, nor was there compliance prior to June 3, 1974. The Declaration of Taking and the Complaint in this matter were therefore premature and the decision to condemn was made without compliance with

statutory and regulatory conditions precedent.

6. The Forest Service has now complied with the regulations of the Advisory Council evidenced by the Memorandum of Agreement.

7. Defendants' Motion to Vacate Judgment on Declaration of Taking and Order for Delivery of Possession is hereby GRANTED. The Court is of the opinion that this action must be dismissed without prejudice. While this may not be the most practical and expeditious means of resolving the dispute here, the Court concludes that it is the more procedurally correct result. The Court is aware of no authority and is of the opinion that it is powerless to advance the date of taking and Order for Delivery of Possession under the facts as presented here. To allow a condemning authority to make a decision to condemn

and file its complaint without first complying with regulations which specifically provide that they must be complied with prior to such a decision to condemn, would provide no real protection to a landowner against possible arbitrary agency action.

8. The Motion to Dismiss Defendants' Application for Relief made by the government at the conclusion of the evidence presented by the defendants, is DENIED.

9. Defendants are not entitled to attorneys fees under 42 U.S.C. §4654(a). It is not the final judgment of this Court that the Forest Service cannot acquire the real property by condemnation, only that the decision to condemn, the Declaration of Taking and the Complaint were premature.

Except as hereinbefore amended and supplemented, the Findings of Fact and

Conclusions of Law heretofore entered herein on the 12th day of November, 1974, are hereby ratified and confirmed.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

DATED this 20th day of February, 1975.

s/ J. BLAINE ANDERSON
J. BLAINE ANDERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff,	
vs.	Civil No. 3-74-33
4.18 ACRES OF LAND, more or less, situated in Idaho County, Idaho; SCOTT STANFORD HARRIS and CONNIE HARRIS, husband and wife; GRETCHEN LOUISE HARRIS and JOHN DOE HARRIS, her husband, if any; BILL HARRIS and JANE DOE HARRIS, husband and wife; HAZLE HARRIS REYNOLDS and ROBERT REYNOLDS, wife and husband; IDAHO COUNTY; ANY AND ALL UNKNOWN OWNERS, Defendants	JUDGMENT OF DISMISSAL WITHOUT PREJUDICE

This matter having come before the Court for an evidentiary hearing on defendants' Motion to Vacate Judgment on Declaration of Taking an Order for Delivery of Possession, and the Court having considered the evidence and arguments of the parties, and having heretofore entered its Amended and

Supplemental Findings of Fact and Conclusions of Law, and being otherwise fully advised,

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that plaintiff's complaint be, and the same hereby is, DISMISSED WITHOUT PREJUDICE. Both parties shall bear their own costs incurred herein.

IT IS FURTHER ORDERED that the title to the real property sought to be condemned herein and more particularly described in the complaint and in the declaration of taking on file herein, which said description is incorporated herein by reference, be, and it is hereby, revested in the defendants in accordance with their respective interests as of the date of taking herein.

IT IS FURTHER ORDERED that the deposit heretofore made by the Plaintiff as and for its estimate of just compensation may be withdrawn forthwith upon written

application to the Clerk of this Court and the giving of an appropriate written receipt therefor.

DATED this 20th day of February, 1975.

s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

Office - Supreme Court, U.S.
FILED
JUN 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1999

In the Supreme Court of the United States

OCTOBER TERM, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether alleged noncompliance by federal officials with the mandate of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, presents a legally sufficient defense to the condemnation of private property under the Declaration of Taking Act, 40 U.S.C. 258a, which provides that "[u]pon the filing said declaration of taking and of the deposit in the court * * * of the estimated compensation * * * title * * * shall vest in the United States * * * and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation * * * shall vest in the persons entitled thereto * * *."

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Berman v. *Parker*, 348 U.S. 26 7

Best v. *Humboldt Mining Co.*, 371 U.S. 334 4

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 7

Catlin v. *United States*, 324 U.S. 229 5

Environmental Defense Fund, Inc. v. *Alexander*, 614 F. 2d 474, cert. denied, No. 80-95 (Oct. 20, 1980) 6

Environmental Defense Fund, Inc. v. *Corps of Eng. of U.S. Army*, 492 F. 2d 1123, aff'g 348 F. Supp. 916 6

Flint Ridge Development v. *Scenic Rivers Ass'n*, 426 U.S. 776 7

Maiatico v. *United States*, 302 F. 2d 880 5

San Diego Gas and Electric Co. v. *San Diego*, No. 79-678 (Mar. 24, 1981) 8

Seadade Industries, Inc. v. *Florida Power & Light Co.*, 245 So. 2d 209 4

Page

Cases—Continued:

United States v. *Carey*, 143 F. 2d 445 5

United States v. *Cobb*, 328 F. 2d 115 4

United States v. *Dow*, 357 U.S. 17 4

United States v. *Hayes*, 172 F. 2d 677 5

United States v. *Miller*, 317 U.S. 369 4

United States v. *178.15 Acres of Land, More or Less, Grayson County, Virginia*, 543 F. 2d 1391 6

United States v. *Sherwood*, 312 U.S. 584 5

United States v. *6.321 Acres of Land, Etc., Suffolk County*, 479 F. 2d 404 5

United States v. *10.69 Acres of Land, Etc., Yakima County*, 425 F. 2d 317 5

United States v. *3,317.39 Acres, Etc., Jefferson Co., Ark. (Ark-Mo Farms)*, 443 F. 2d 104, cert. denied, 404 U.S. 1025 5

United States v. *255.25 Acres of Land, More or Less, Monroe County, Missouri (Moutray)*, 553 F. 2d 571 6

United States v. *2,974.49 Acres (Clarendon County, South Carolina)*, 308 F. 2d 641 5

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 7

Page

Statutes and rule:

Declaration of Taking Act, 40 U.S.C. 258a-258e 4

40 U.S.C. 258a 4, 7

National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 6

National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* 3

16 U.S.C. 470f 6

Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 635 2

Fed. R. Civ. P. 71A 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1999

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 639 F. 2d 299. The opinion of the district court (Pet. App. 21-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1981 (Pet. App. 38-39). A timely petition for rehearing was denied on April 15, 1981 (Pet. App. 40-42). The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were owners of property near the Tombigbee River in Clay County, Mississippi. Petitioners' former

property, which contains a four-room, one-story, nineteenth century dwelling known as Cedar Oaks, is within the area once occupied by the abandoned riverfront town of Barton (ca. 1848-1870). In connection with the Tennessee-Tombigbee Waterway Project, authorized by the Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 634, 635,[1] the United States Army Corps of Engineers intends to incorporate petitioners' property into the "Barton Ferry Recreation Area," an area that will also include the abandoned riverfront towns of Colbert (ca. 1830-1847) and Vinton (ca. 1849-1900?). Cedar Oaks and the Barton townsite are listed on the National Register of Historic Places as within the Tombigbee River Multi-Resource District, a zone created for the purpose of listing historic sites in the project area (Pet. App. 2-3).

In July 1977, the Corps gave notice to petitioners that it intended to acquire their property for use in the Barton Ferry Recreation Area. Petitioners thereafter submitted to the Attorney General of the United States an "Application to Exclude Property from Condemnation Proceeding." The application explained that petitioners used the land as a tree farm, and that their crop was ready for harvest.[2] The application further stated that petitioners had previously established campsites on the property, that they had permitted church and youth groups to camp on the property without charge, and that they intended to establish additional

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[1]Congress has appropriated $984.9 million for contruction of the project since fiscal year 1971: $1 million (FY 1971), $6 million (FY 1972), $12 million (FY 1973), $18 million (FY 1974), $37.9 million (FY 1975), $101 million (FY 1976), $104 million (FY 1977), $172 million (FY 1978), $156 million (FY 1979), $165 million (FY 1980), and $212 million (FY 1981).

[2]Petitioners had originally scheduled a timber sale for December 1975. When the Corps realized the adverse impact that a timber cut would have on the aesthetics of the area (which was to be used for recreational purposes), the Corps obtained a delay of the sale. Thereafter, in July 1976, the Corps purchased the timber rights for $63,000.

campsites. Petitioners asked to be permitted to continue to develop the property at their own expense for public recreation, timber production, and for maintenance of their own residence. The application declared that petitioners' property was not essential to the project; petitioners explained that the property of another landowner, lying south of petitioners' property (and omitted from the proposed condemnation), was equally suitable for use as camp grounds. The application was not granted (Pet. App. 3-5).

On February 14, 1978, the United States filed a complaint and declaration of taking, together with a deposit of estimated just compensation covering petitioners' property. Ten days later, the district court entered a judgment on the declaration of taking (Pet. App. 3-5). Thereafter, on April 6 and 14, 1978, petitioners filed answers that raised four defenses (see Pet. App. 5, 21- 22, 24-26) to the taking: (1) that the complaint did not state a cause of action; (2) that the complaint did not contain a short and plain statement of the use for which the property is taken; (3) that there was no public necessity for the taking; and (4) that the government had failed to comply with the provisions of the National Historical Preservation Act of 1966 ("NHP Act"), 16 U.S.C. 470 *et seq.*

After a hearing, the district court granted the government's motion to strike these defenses (Pet. App. 32-33). With respect to the fourth defense, the court stated that (*id.* at 27-28), "[t]he government does not contend that the Corps of Engineers is not required to comply with the [NHP] Act[, but] * * * that the Corps is now in compliance therewith." The government contended only, as the court noted (*id.* at 28; emphasis added), "that it is not required to comply with the [NHP] Act *before* it can exercise the right of eminent domain in the action sub judice." Based on a stipulation as to the amount of compensation that would be due if the government had the legal right to condemn the

property, the court entered a final judgment on August 19, 1980 (Pet. App. 34-37).

The court of appeals affirmed in part, vacated in part, and remanded (Pet. App. 1-20). The court held (*id.* at 14-16) that alleged noncompliance by federal officials with the mandate of the NHP Act is not a legally sufficient defense to a condemnation under the Declaration of Taking Act, 40 U.S.C. 258a. The court of appeals also held, however, that a district court in condemnation may require compliance with the NHP Act, and either withhold possession by the government or take appropriate injunctive action to enforce its order (Pet. App. 18). Noting (*id.* at 19-20) that the government had argued on appeal that it had in fact fulfilled its duty under the NHP Act (and had submitted numerous documents to show that it had done so), the court of appeals remanded the case to the district court so that the district court could determine in the first instance whether compliance had occurred.

ARGUMENT

1. The Declaration of Taking Act 40 U.S.C. 258a-258e, was enacted by Congress to enable the federal government to secure prompt transfer of title to property, free of technical defenses.[3] Thus, when the United States files a declaration of taking and deposits the estimated compensation in the registry of the district court, title to the estate described in the declaration immediately vests in the United States. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 340 (1963); *United States* v. *Dow*, 357 U.S. 17, 23 (1958); *United States* v. *Miller*, 317 U.S. 369, 381 (1943). Once title vests under

[3]We note at the outset that the decision below does not conflict with any previous decision of this Court or of any other court of appeals. Although petitioner contends (Pet. 33) that the decision below conflicts with the Florida Supreme Court's decision in *Seadade Industries, Inc.* v. *Florida Power & Light Co.*, 245 So. 2d 209 (1971), that case involved only questions of Florida condemnation law.

the Act, the district court lacks the power to dismiss the proceedings (*United States* v. *Cobb*, 328 F. 2d 115, 116 (9th Cir. 1964); *United States* v. *2,974.49 Acres (Clarendon County, South Carolina)*, 308 F. 2d 641, 643 (4th Cir. 1962)), and title cannot be revested, either by the government's dismissal of the condemnation petition (*United States* v. *Carey*, 143 F. 2d 445, 450 (9th Cir. 1944)), or by the district court's dismissal of the petition because of, for instance, want of prosecution (*United States* v. *Hayes*, 172 F. 2d 677, 679 (9th Cir. 1949)).

Because condemnation proceedings rest upon the sovereign's exercise of its power of eminent domain, the only defense[4] that may be considered is lack of authority. See, *e.g.*, *Catlin* v. *United States*, 324 U.S. 229, 240-241 (1945).[5] Here, Congress has clearly authorized the project for which

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[4]Because the sovereign may not be sued without its consent (*United States* v. *Sherwood*, 312 U.S. 584, 590 (1941)), a landowner may not file a counterclaim in a condemnation proceeding brought under Fed. R. Civ. P. 71A (*United States* v. *6.321 Acres of Land, Etc., Suffolk County*, 479 F. 2d 404, 406-407 (1st Cir. 1973); *United States* v. *3,317.39 Acres, Etc., Jefferson Co., Ark. (Ark-Mo Farms)*, 443 F. 2d 104, 106 (8th Cir. 1971), cert. denied, 404 U.S. 1025 (1972)). Of course, a landowner may file an independent action to enforce other statutes.

[5]The cases upon which petitioners rely (see Pet. 10) merely illustrate this principle. In *United States* v. *10.69 Acres of Land, Etc., Yakima County*, 425 F. 2d 317 (1970), the Ninth Circuit held that the government lacked authority to condemn unallotted Indian tribal land (which it held in trust for a tribe), without first complying with certain administrative procedures that had been expressly imposed by Congress. Likewise, in *Maiatico* v. *United States*, 302 F. 2d 880 (D.C. Cir. 1962), the court held that the Administrator of the General Services Administration had no authority to acquire a building in the District of Columbia that was not within the "taking area" defined by Congress in Section 7(a) of the Public Building Act of 1959, 40 U.S.C. 606(a), and for which GSA had not obtained approval from the House and Senate Committees on Public Works, as required by the statute.

petitioners' property was taken,[6] and nearly $1 billion has been appropriated for the project. See page 2, note 1, *supra*. Thus, petitioners' only proper defense to the taking, lack of authority, was correctly rejected by both courts below.

2. The National Historic Preservation Act of 1966 ("NHP Act"), 16 U.S.C. 470f, is a procedural statute designed to protect our nation's cultural heritage by assuring that a good faith consideration of preservation values is made before the federal government takes or permits an action that could damage or destroy properties listed on the National Register. The NHP Act is addressed to federal action; it neither enhances nor diminishes the rights of property owners. Thus, preservation of a structure is not required simply because it is listed (or is eligible for listing) on the National Register. A private property owner remains legally free to alter, or even destroy, his own structure.

With respect to the relationship of the Declaration of Taking Act and the NHP Act, three points emerge. First, as is the case under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.* (which requires consideration of environmental factors in federal decisionmaking), the technical transfer of title by condemnation is, for purposes of the NHP Act, a "neutral" act that does not result in any adverse impact on property.[7] Second, as the courts have

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[6]The history of this project has been extensively reviewed by the courts. See *Environmental Defense Fund, Inc.* v. *Corps of Eng. of U.S. Army*, 492 F. 2d 1123, 1127-1128 (5th Cir. 1974), aff'g 348 F. Supp. 916 (N.D. Miss. 1972); *Environmental Defense Fund, Inc.* v. *Alexander*, 614 F. 2d 474 (5th Cir. 1980), cert. denied, No. 80-95 (Oct. 20, 1980).

[7]The court of appeals correctly noted (Pet. App. 16 n.5) that other courts had held that compliance with NEPA is "irrelevant" to the validity of a taking under the Declaration of Taking Act. See *United States* v. *178.15 Acres of Land, More or Less, Grayson County, Virginia*, 543 F. 2d 1391 (4th Cir. 1976); *United States* v. *255.25 Acres of Land, More or Less, Monroe County, Missouri (Moutray)*, 553 F. 2d 571 (8th Cir. 1977).

held in circumstances where NEPA has appeared to conflict with provisions of other statutes, it is clear that Congress did not intend to repeal by implication any other statutes, including the Declaration of Taking Act, when it enacted the NHP Act. See, *e.g., Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978); *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). Third, as the court of appeals clearly understood (Pet. App. 16-20), the policies of the Declaration of Taking Act and the NHP Act are not irreconcilable. Thus, the Declaration of Taking Act allows the government to acquire immediate title to property, upon the filing of a declaration of taking and the deposit of estimated just compensation, and a properly-filed declaration of taking should not be frustrated by any defenses, other than lack of public use or lack of legislative authority to take. See, *e.g., Berman* v. *Parker*, 348 U.S. 26 (1954). In the event that condemnation may threaten the cultural values addressed by the NHP Act, the Declaration of Taking Act provides a remedy: the court may withhold physical possession and enjoin construction or any activity that may disturb the cultural or physical environment, pending compliance with the congressional mandate. 40 U.S.C. 258a. Likewise, the court has the equitable power to enjoin a project when the government has not complied with the NHP Act. These avenues are sufficient to enable the court to preserve the status quo pending compliance with the NHP Act, without doing violence to the Declaration of Taking Act.

Here, the court of appeals declined to determine whether the Corps had in fact complied with the NHP Act in this case. Instead, the court remanded the case so that the district court could determine in the first instance whether compliance had occurred. In these circumstances, the present case is not ripe for review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327,

328 (1967); *San Diego Gas & Electric Co.* v. *San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 10-11. The controversy between petitioners and the United States may be fully resolved by the district court on remand, without any necessity for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ALEXANDER L. STEVAS,

NO. 80-1999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, G.E. UITHOVEN, CARRIE UITHOVEN, DAVID ASHMORE, PAUL THORNE, AND JAMES L. YOUNG

Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Table of Authorities.	ii
Argument	1
Certificate of Service	5

TABLE OF AUTHORITIES

PAGE

STATUTES

National Historic Preservation Act, 16 U.S.C. §461 et seq 2,3

Rule 12(F), Federal Rules of Civil Procedure 1,2,3

CASES

Eisen v. Carlisle & Jacquelin, 417 U.S. 56, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) 1

Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) 1

ARGUMENT

For the first time, the United States implicitly contends in its Brief in Opposition, that the judgment of the District Court is not a final judgment subject to review by this Court. This argument is without merit. The judgment of the District Court was final and subject to review at the time it was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (See Appendix at 34-37). Petitioners' right to appeal has heretofore been unquestioned. The judgment of the District Court disposed of every issue presented and is clearly a final judgment. See Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) and Eisen v. Carlisle & Jacquelin, 417 U.S. 56, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

The appeal to the Circuit Court con-

cerned only the legal issue of the sufficiency of the defense, within the meaning of Rule 12(F) of the Federal Rules of Civil Procedure, that the United States may not condemn property listed on the National Register of Historic Property without compliance with the National Historic Preservation Act, 16 U.S.C. §461 et seq, (hereinafter NHPA).

The Court of Appeals decided this issue adversely to Petitioners and affirmed the judgment of the District Court. In addition, the Court of Appeals stated that the landowners could litigate any issues relevant to NHPA compliance they wished, but that such issues in no way affected the right of the United States to condemn the property. The Court of Appeals remanded for the limited purpose of allowing Petitioners to litigate NHPA compliance for purposes of possession and injunctive

relief. Therefore, as the case now stands, the United States has the absolute right to condemn National Register property without compliance with NHPA. If this Court declines review, there will be no opportunity in the future to review the legal issue presented by the tendered defense to the taking. That issue simply will not be before the District Court on remand. Future proceedings cannot and will not resolve the controversy between the parties, because they will not deal with the allegedly unlawful divestiture of Petitioners' property. Future proceedings will not affect the posture of the legal issue before this Court, since the issue comes before the Court on a motion to strike filed by the United States pursuant to Rule 12(F) of the Federal Rules of Civil Procedure. Furthermore, under the mandate of the Circuit Court, on remand there will

be no factual development of any issues pertaining to the validity of the taking. In short, the issue before the Court is not only not premature, but review will be forever foreclosed if not afforded at this time. Under these circumstances, we, therefore, respectfully conclude that this case is clearly ripe for review.

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing have been mailed, postage prepaid, United States Mail, addressed to counsel of record at his post office address, Mr. Jacques Gelin, Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C., 20530, and that three (3) copies have been mailed, postage prepaid, United States Mail, to the Solicitor General, Department of Justice, Washington, D.C., 205[illegible], this 15th day of July, 1981.

s/ J. ARTHUR SMITH

J. ARTHUR SMITH, III